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1. Suretyship includes all forms of contract to pay the debt, or answer for the default of another

3

All contracts of suretyship must be created by express contract

Infancy

Coverture

Insanity

Corporations

Guaranty.

1. Consideration,

2. Construction

3 Gen & Gen. Guar

4 Spec. Guaranty

5 Limited "

6. Continuing "

7 Conditional "

8. Notice of acceptance

9. Absolute Guaranty

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ice of Suit

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lterations of Contract
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xtension of time

ayment of other securities

elease of collateral & by test,

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CASES

ON

GUARANTY AND SURETYSHIP

SELECTED BY

ROBERT E. BUNKER

OF THE DEPARTMENT OF LAW OF THE UNIVERSITY OF MICHIGAN

GEORGE WAHR
PUBLISHER AND BOOKSELLER
ANN ARBOR, MICH.

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PREFATORY.

The cases appearing in this volume have been selected for use in connection with the lectures on Suretyship given in the Law Department of the University of Michigan. Barring omission of irrelevant matter in some instances and of the briefs and arguments of counsel in all instances, the cases appear in this volume as they appear in the reports themselves. Uniformity in spelling and punctuation has not been attempted or thought desirable. In regard to these matters, the reports have been followed, except in cases of manifest error.

The purpose has been to put into the hands of the students taking the course in Suretyship in this University a limited number of cases which will serve to illustrate and, in some measure, to supplement the lectures on that subject. Some cases have been selected for the forms and suggestions they furnish in the practical work of preparing bonds and such other instruments as pertain to the general subject—such work being a material feature of the course. Such a volume as this would not be necessary were it possible for students to consult the reports themselves in season to prepare the work required of them. The great number of students attending the Law Department of this University puts that possibility out of question, and that, too, despite the very complete Law Library so arranged as to afford the best means for its largest use.

Robert E. Bunker.

University of Michigan,
Ann Arbor, Mich.
November, 1902.

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CASES

ON

GUARANTY AND SURETYSHIP

KEARNES *vs.* MONTGOMERY (1870).

4 W. Va. 29.

Boggess, for plaintiff in error.

Dennis & Price, for defendant in error.

The facts are stated in the opinion of Maxwell, J.

MAXWELL, J. This was an action of assumpsit, to recover from the defendant the sum of 2,000 dollars, with interest. The facts certified show that on the 28th day of January, 1860, the plaintiff held the bond of the defendant and one J. N. Montgomery for 2,000 dollars; that the defendant, on the day and year aforesaid, proposed to exchange with the plaintiff for the said bond, a bond of 2,000 dollars executed by Thomas Creigh and L. S. Creigh, to the plaintiff; that the plaintiff refused to accept the said last mentioned bond unless the defendant would indorse the same, inasmuch as it was payable to the plaintiff and not to the defendant: whereupon the said defendant wrote his name upon the back of the said bond, which was then accepted by the plaintiff, who, in exchange therefor, delivered to the defendant the said bond of the defendant and J. N. Montgomery; that afterwards, and after the institution of the suit, but before the trial, the plaintiff wrote above the blank indorsement of the defendant, a promise binding the defendant as surety of the said Thomas Creigh and L. S. Creigh; that the bond with the indorsement thereon is as follows:

"On or before the first of March, 1861, with interest from the first of March, 1860, we or either of us bind ourselves, our heirs, etc., to pay

Alexander Kearnes the just and full sum of two thousand dollars, for value received.

"Witness our hands and seals this 28th of January, 1860.

"THOMAS CREIGH. [seal]
"LEWIS S. CREIGH." [seal]

"For value received. I hereby become the surety of Thomas Creigh and Lewis S. Creigh as obligors in the within bond.

"WM. H. MONTGOMERY."

That the debt against the Creighs could have been made by suit in the year 1861, and after the close of the war in 1865, and that the said Creighs have been insolvent since 1866, and that since that time the debt could not have been made off of them by suit. Upon these facts judgment was rendered for the defendant. The plaintiff in error insists that the judgment is erroneous, because upon the facts proved, the defendant was a surety or maker of the bond in question and primarily liable for its payment, while it is insisted for the defendant that he was a guarantor merely and only liable for the payment of the bond in case the money could not be made off of the makers of the paper after it fell due, by the use of due diligence which, he insists, was not used before the makers became insolvent. Whether the defendant is guarantor or maker depends on the understanding of the parties. If the payee or assignee of paper, not negotiable, indorse his name in blank on the back of it, he is *prima facie* assignor, but if a stranger indorse his name in blank on the back of paper, not negotiable, he is *prima facie* guarantor; but this presumption may be rebutted by showing the original understanding of the parties, by showing an express agreement otherwise, or by showing circumstances from which one may be inferred.

The contract of a guarantor is collateral and secondary. It differs in that respect generally from the contract of a surety which is direct; and in general the guarantor contracts to pay if, by the use of due diligence, the debt cannot be made out of the principal debtor, while the surety undertakes directly for the payment and so is responsible at once if the principal debtor makes default. As the proper diligence was not used against the Creighs, if the defendant is guarantor merely he is not liable for the payment of the debt; while if he is to be treated as surety, he is liable. It becomes, therefore, necessary to determine whether he is a technical guarantor merely or a surety. * * *

The plaintiff, after suit brought, wrote over the name of the defendant, "For value received, I hereby become the surety of

Thomas Creigh and Lewis S. Creigh as obligors in the within bond." It is upon this contract, so written by the plaintiff, that he claims his right to recover from the defendant. The plaintiff might write anything over the name of the defendant, consistent with the contract of the defendant, so as to carry it out. He could not write the words which he did write, unless upon special contract between the parties, disclosed by the evidence and surrounding circumstances. The evidence, instead of sustaining and authorizing this special contract as written by the plaintiff, does not even tend to show any such understanding, but on the contrary shows, so far as can be inferred from it, that the defendant was to assume the same situation as to liability that he would have occupied if the paper had been executed to him as payee and transferred by him to the plaintiff. As the facts proved wholly fail to show a contract on the part of the defendant to be liable as maker or surety, it follows that he is liable only as guarantor.

The facts proved show affirmatively that, by the use of due diligence against the Creighs, the plaintiff might have made the money.

The judgment complained of will, therefore, have to be affirmed with damages and costs.

The concurring opinion of BROWN, Pres't, is omitted.

SAINT *et. al.* *vs.* WHEELER & WILSON MFG. CO. (1891).

95 Ala. 362; 36 Am. St. R. 210; 10 So. 539.

Action by Wheeler & Wilson Mfg. Co. against R. F. Saint, A. J. Crosthwait, C. M. Wright, J. F. Hall and J. R. Spragins, parties to a contract under seal, in the words and figures following:

> "For value received and in consideration of the within contract, R. F. Saint (and the other defendants, giving their names and residences respectively), hereby guarantee to the Wheeler & Wilson Mfg. Co., its successors or assigns, the full and faithful performance of the foregoing contract, including all damages which may result to the said company from any failure on the part of said R. F. Saint to perform any of the provisions of said agreement to the amount of $1,000; hereby waiving all necessity on the part of said company of instituting legal proceedings against said R. F. Saint before having recourse on us; hereby waiving the benefit of

Guaranty v. Surety.

all constitutional or statutory homestead or exemption laws now in force; further agreeing to pay plaintiff's attorney's fees and all costs should suit be necessary to enforce the collection of this bond.

"Witness our hands and seals, etc."

This contract or bond was written on the back of the contract therein referred to, by which said company, as party of the first part, employed said Saint, party of the second part, as its collector, which contract sustained these provisions, among others:

1. The party of the first part (Wheeler & Wilson Mfg. Co.) agreed to employ the party of the second part as its collector.

2. The party of the second part is to engage in no other business but to devote his time exclusively to collecting claims given him from time to time by the party of the first part.

3. The party of the second part agrees to remit to the party of the first part on Saturday of each week the full amount of all collections made by him.

4. All notes, leases and cash received by the party of the second part on account of the party of the first part shall be held and rendered strictly as the property of the said party of the first part subject to their order and under their control.

6. The party of the second part is to receive as full compensation for his services under this agreement, a salary of $50 per month and necessary traveling expenses * * *.

All the defendants filed the plea of the general issue. The other sureties on the bond filed separate pleas, twenty-two in number, including those to which demurrers were sustained.

A. J. Crosthwait separately pleaded that, before Saint had entered on the discharge of his duties as collector, he notified plaintiff to take his name off the bond—that he would not become a surety on the bond: that the plaintiff made no objection and he was thereby released from any obligation on the bond. The other sureties on the bond filed a separate plea that they signed the bond with the understanding that Crosthwait was also jointly liable with them on the bond and that a release of Crosthwait on the bond without their consent released them.[1]

The evidence introduced on the trial of the case established the following facts: That the above contract was executed by the plaintiff and R. F. Saint and the bond was executed by the defendants, Wright, Crosthwait, Hall and Spragins, as sureties on the bond. That Saint received from the plaintiff a large list of notes and accounts for collection; that he collected a considerable amount of money for it, paying over a portion of it and retaining or embezzling the balance of it. After the bond was executed, Saint carried it or sent it to Nashville to the plaintiff; that when Saint went to Nashville to begin work under the contract and before he had reached that place or had received any notes or accounts from the plaintiff, Crosthwait notified plaintiff to take his name off the bond, which was a revocation of his guaranty, and, plaintiff not having refused, he regarded himself released. Plaintiff did not decline to release him but simply asked his reasons; and after that plaintiff gave Saint the notes and accounts to collect. That when Saint went to Nashville to take charge of the work assigned to him under the contract, the original contract was changed and Saint was permitted to retain from his weekly collections all his expenses and a salary of $50 per month instead of remitting to plaintiff the full amount of his collections. That in February, 1888, the plaintiff, through W. W. Walls, made another change in the contract, whereby Saint was to get only $9 per week instead of $50 per month for his services as collector, and that Saint worked under this last contract until he quit, but, on a settlement he made with the company through Walls, he was allowed $50 per month. That Saint was required to sell and discount notes and accounts which had been put in his hands for collection under the contract. That he was required to take up the sewing machines and sell them again for such prices as he could get for them, and that he did take up some machines for the plaintiff, but did not know how many, and sold some of them under instructions from the plaintiff. That Wright, Hall and Spragins knew nothing about Crosthwait revoking his guaranty on the bond; that they signed it with the understanding and agreement that Crosthwait was jointly liable with them. It was also proved that in February, 1888, the plaintiff, through its agent, had notice of Saint's defalcation and that after such notice said company continued Saint in its employment. The defendants knew nothing about the changes made in this contract between Saint and the plaintiff after the bond was signed. They never consented to any of the changes. The plaintiff never notified either of them of Saint's dishonest act in appropriating the plaintiff's money. Defendants then offered to prove by each of the defendants that they had not consented to a change in the contract and had no knowledge of such change.

---

[1] The other pleas of the defendant and the further statement of facts are omitted.

Defendants introduced as evidence a number of letters written by plaintiff to the defendant, R. F. Saint, in which they authorized him to discount notes and use his discretion. All the letters show that Saint was required to do other work than that required under the written contract; all of which increased the risk which the sureties had incurred.

In addition to the other charges requested by the defendant in writing were the following:

5. "If the jury believe from the evidence that in February, 1888, Saint had only used $50 or $60 of the plaintiff's money, and that Saint notified the plaintiff that he was short that amount, then it was the duty of the plaintiff to notify the sureties, Wright, Crosthwait, Hall and Spragins, and, if the plaintiff failed to notify them of such fact, they cannot recover against these sureties for any defalcation of Saint after that time."

7. "If the jury believe from the evidence that A. J. Crosthwait was released from the bond as guaranty after the other sureties, Wright, Crosthwait, Hall and Spragins had signed it, then I charge you that such release was a material change in the contract. And if you further believe from the evidence that such change was made without the knowledge and consent of Wright, Hall, and Spragins, and Crosthwait, then the plaintiff cannot recover against them."

9. "If the jury believe from the evidence that in February, 1888, the plaintiff had notice that defendant, Saint, had collected money for it which he had converted to his own use, then it was the duty of the plaintiff to notify Wright, Hall, Crosthwait, and Spragins, his securities, and if it failed to notify them, the plaintiff cannot recover against said sureties for the money collected and appropriated to his own use after the time."

The defendants separately excepted to the court's refusal to give the several charges requested by them * * *.

There were verdict and judgment for the plaintiff. Defendants appeal.

Kirk & Almon, for appellants.

Roulhac & Nathan, for appellee.

McClellan, J. The contract sued is not a guaranty, but one of suretyship. Crosthwait and the other defendants, who undertake that Saint shall faithfully perform his contract with the company, are sureties of Saint and not guarantors. The distinction between the two classes of undertakings is often shadowy, and often not observed by judges and text-writers; but that there is a substantive distinction, involving not infrequently important consequences, is, of course, not to be doubted. It seems to lie in this: that when the sponsors for another assume a primary and direct liability, whether conditional or not, in the sense of being immediate or postponed till some subsequent occurrence, to the creditor, they are sureties; but when this responsibility is secondary, and collateral to that of the principal, they are guarantors. Or, as otherwise stated, if they undertake to pay money or to do any other act in the event their principal fails therein, they are sureties; but, if they assume the performance only in the event the principal is unable to perform, they are guarantors. Or, yet another and more concise statement, a surety is one who undertakes to pay if the debtor do not; a guarantor, if the debtor cannot. The first is sponsor absolutely and directly for the principal's acts; the latter, only for the principal's ability to do the act. "The one is the insurer of the debt; the other, an insurer of the insolvency of the debtor." This is the essential distinction. There is another, going as well to its form. The contract of suretyship is the joint and several contract of the principal and surety. "The contract of the guarantor is his own separate undertaking, in which the principal does not join." Indeed, it has been held, pretermitting all other considerations, that no contract joined in by the debtor and another can be one of guaranty on the part of the latter. (*McMillan* v. *Bank,* 32 Ind. 11, 10 Amer. Law Reg., N. S., 435, and notes.) Though we apprehend that a case might be put, involving only secondary liability on the sponsors, though the undertaking be signed also by the principal. However that may be, it is certain that in most cases the joint execution of a contract by the principal and another operates to exclude the idea of a guaranty, and that in all cases such fact is an index pointing to a suretyship. See Brandt, Sur. Sections 1, 2; 9 Amer. & Eng. Enc. Law, p. 68; *Marberger* v. *Pott,* 16 Pa. St. 9; *Allen* v. *Hubert,* 49 Pa. St. 259; *Reigart* v. *White,* 52 Pa. St. 438; *Kramph's Ex'r* v. *Hatz's Ex'r,* Id. 525; *Birdsall* v. *Heacock,* 18 Amer. Law Reg. (N. S.) 751, and notes; *Hartman* v. *Bank,* 103 Pa. St. 581; *Courtis* v. *Dennis,* 7 Metc. (Mass.) 510; *Kearnes* v. *Montgomery,* 4 W. Va. 29; *Walker* v. *Forbes,* 25 Ala. 139.

Applying these principles to the bond sued on, the conclusion must be that it is not a guaranty, but a contract of suretyship, on the part of Crosthwait, Wright, Hall and Spragins. It is not their separate undertaking, but the principal also executes it. While they employ the word "guaranty," they directly obligate themselves, along with Saint, to pay—absolutely and wholly, irrespective of Saint's solvency or insolvency—all damages which may result to the obligee from his default. Not only so, but they expressly stipulate that the company need not exhaust its remedies against Saint before proceeding against them. It is, in other words, and in short, a primary undertaking on their part—not secondary and collateral—to pay to the company in the event of Saint's failure, and not an undertaking to pay only in the event of Saint's default and inability to pay. They are sureties of Saint, and not his guarantors; and their rights depend upon the law applicable to the former relation, and not upon the law controlling the latter. One of the important differences in the operation, effect, and discharge of the two contracts finds illustration in this case. The undertaking of guaranty, in a case like this, is primarily an offer, and does not become a binding obligation until it is accepted and notice of acceptance has been given to the guarantor. Till this has been done, it cannot be said that there has been that meeting of the minds of the parties which is essential to all contracts. *Machine Co.* v. *Richards*, 115 U. S. 524, 6 Sup. Ct. Rep. 173; *Walker* v. *Forbes*, 25 Ala. 139. Being thus a mere offer it may be recalled, as, of course, at any time before notice of acceptance. Indeed, there are authorities which hold that even after acceptance, and notice thereof, the guarantor may revoke it by notice that he will no longer be bound, unless he has received a continuing or independent consideration which he does not renounce, or unless the guarantee has acted upon it in such way as that revocation would be inequitable and to his detriment; and, in cases of continuing guaranty, the effect of such revocation is to confine the guarantor's liability to past transactions. 2 Pars. Cont. 30; *Allan* v. *Kenning*, 9 Bing. 618; *Offord* v. *Davies*, 12 C. B. (N. S.) 748; *Tischler* v. *Hofheimer*, (Va.) 4 S. E. Rep. 370. All this is otherwise with respect to the contract of a surety. He is bound originally, in all respects, upon the same footing as the principal. His is not an offer depending for efficacy upon acceptance, but an absolute contract, depending for efficacy upon complete execution; and its execution is completed by delivery. From that moment his liability continues until discharged in accordance with stipulations of the instrument, or by some unauthorized act or omission of the obligee violative of his rights under the instrument, or by a valid release. Nothing that he can do outside of the letter of the bond can free him from the duties and liabilities it imposes. He cannot assert the right to revoke unless the right is therein nominated. As was said by the English court, if he desired to have the right to terminate his suretyship on notice, he should have so specified in his contract. *Calvert* v. *Gordon*, 3 Man. & R., 124; Brandt, Sur. Sec. 113, 114.

The evidence here as to the release of Crosthwait tends to show no more than this: That after the bond had been delivered to plaintiff, and after its officers had advised Saint that they were ready for him to enter on the discharge of his duties under the contract secured by the bond, he (Crosthwait) requested plaintiff to take his name off the paper. No assent to this request is shown, but only an inquiry on the part of plaintiff as to Crosthwaite's reasons for desiring to be released. It would seem that the court itself should have decided that these facts did not release Crosthwaite, but the question appears to have been submitted to the jury. If this submission, or any of the instructions accompanying it, was erroneous, no injury resulted to defendants, since the jury determined the point against the alleged release, as the court should have done, assuming it to have been a question of law. On the other hand, if it were a question for the jury, it is to be presumed they were properly instructed as to the rules of law which should guide them to its solution, as no exceptions were reserved in that regard. The exceptions which were reserved on this part of the case are to charges given, and to the refusal to give charges asked by defendants declaratory of the effect which the discharge of Crosthwaite, if the jury found he had been discharged, would have upon the liability of his co-sureties. As the jury found expressly that he had not been discharged, these exceptions present mere abstractions not necessary to be decided. We have no doubt, however, but that the law in this respect was correctly declared by the court to be that the release of Crosthwaite operated to release the other sureties only to the extent of his aliquot share of the liability.

Brandt, Sur. Sec. 383; Burge, Sur. 386; *Klingensmith* v. *Klingensmith*, 31 Pa. St. 460; Ex Parte Gifford, 6 Ves. 805; *Shock* v. *Miller*, 10 Pa. St. 401; *Currier* v. *Baker*, 51 N. H. 613; *Governor* v. *Jemison*, 47 Ala. 390.

The sureties of Saint insisted on the trial below that they were discharged from all liability on the bond by reason of certain alleged changes made in the original contract between their principal and the company, by the parties thereto, after they became sureties for its faithful performance, and without their knowledge, consent, or ratification. It is not pretended that the paper writing evidencing this contract was ever altered in any respect, but that its terms were changed by subsequent parol agreements, in the following respects, among others to be presently considered: First, that under this contract, which constituted Saint a collector only for the company, he was instructed and required to take up and resell sewing machines when he found the notes for the purchase money of the same, and which were in his hands for collection, could not be collected; and, second, that he was authorized to discount or sell the notes placed in his hands for collection, when the same could not be otherwise realized upon. Nothing is claimed in this action on account of Saint's misconduct in respect of any property thus taken up or resold, or of any note discounted by him, or with respect to the proceeds of any such sale or discount. If these duties were such as usually devolved upon a collector for a sewing machine company,—as to which there is no evidence in this record, and no necessity for any, under the present complaint,—it may be that Saint's sureties would be responsible for their faithful performance on his part to the same extent as for money collected on notes in his hands. *Bank* v. *Ziegler,* 49 Mich. 157, 13 N. W. 496.

However that may be, the fact that they were imposed upon him, assuming they were not covered by his contract, and hence were in addition to those assured by the other defendants, cannot relieve his surties from liability with respect to those which were imposed by the contract, unless the imposition of these new duties and their performance by Saint rendered impossible, or materially hindered or impeded, the proper and faithful performance of the service originally undertaken. There is no evidence here that these new and additional duties interfered with the collection of notes placed in his hands for that purpose, nor is any claim made against his sureties on account of any failure to collect such notes. But the *gravamen* of the action is that he (1) did collect these notes, and converted the proceeds to his own use; or (2) that he failed to deliver such notes to the company on the termination of his employment. We are unable to conceive how the fact that he had other property and funds—machines and the proceeds of discounted notes—in his possession, could have hindered or impeded him in the accounting for funds collected or notes remaining in his hands, or could in any degree have conduced to his conversion of such funds or notes. To the contrary, it would seem, in all reason, that the possession of this other property and these other funds, out of which he might have met the necessities which presumably induced his malversations, would have lessened the chances of misappropriation of the funds and property for which his sureties were responsible, and thus have lessened, instead of increased, their exposure to liability. We are very clear to the conclusion that the imposition of these new duties, not covered by the contract, did not discharge the sureties with respect to those embraced in the contract, and as to which no change in the particulars we are considering was attempted.

City of New York v. *Kelly*, 98 N. Y. 467; *State* v. *Vilas*, 36 N. Y. 459; *Ins. Co.* v. *Potter*, 4 Mo. App. 594; *Com.* v. *Holmes*, 25 Grat. 771; *Bank* v. *Traube*, 75 Mo. 199; *Gaussen* v. *U. S.*, 97 U. S. 584; *Jones* v. *U. S.*, 18 Wall. 662; *Ryan* v. *Morton*, 65 Tex. 258; *Bank* v. *Gerke* (Md.), 13 Atl. 358, 6 Amer. St. R. 453, and note, 458; *Bank* v. *Zeigler*, 49 Mich. 157, 13 N. W. 496.

The sureties further defended on the ground that the contract between Saint and the company was changed without their knowledge or assent by a subsequent parol agreement entered into by their principal and Walls, representing the company, whereby Saint's compensation was to be reduced from $50 per month to $9 per week. There was evidence of such agreement but none that it was supported by a consideration or that it was approved by plaintiff; and it appears from other evidence that all of Walls' contracts were subject to approval or rejection by other officers of the corporation, and that plaintiff settled with Saint on a basis as to compensation of $50 per month. We think, on these facts, this defense is without merit.

Steele v. *Mills*, 68 Iowa, 460, 27 N. W. 294.

Equally untenable, in our opinion, is the defense which proceeds on the ground that the instruction of plaintiff to Saint to retain his salary and expenses out of collections made by him was a material change of that provision of the contract which required him to remit to the company on the last day of each week the amount collected up to that day. The contract provided for Saint's compensation and expenses, but was silent as to the manner of payment. Method of payment thus adopted tended to decrease the risks of the sureties, as affording less occasion for conversion by Saint than had payments to him been made only at the end of each month. It is well settled that mere indulgence of the creditor to the principal, the mere forbearance to take steps to enforce a liability upon default, or even an understanding between them looking to payment of the deficit presently due at some time in the future, which does not, for the want of a consideration to support it, or other infirmity, prevent the creditor from immediately demanding payment, will not discharge the surety. Hence what took place between Walls and Saint in February, 1888, in regard to allowing the latter further time to make good the sum he had theretofore converted, afforded no defense to the sureties with respect to the sum then due.

3 Brick Dig., p. 715, Sec. 36-43; 9 Amer. & Eng. Enc., Law, p. 83, note 4; *Canal, etc., Co. v. Van Vorst*, 21 N. J. Law, 100.

The sureties, however, on another aspect of the transaction last above referred to between Saint and Walls, predicate a defense going to the amount of their liability. They insist that Saint was at that time a defaulter by embezzlement; that Walls knew this fact, and, without giving any notice of it to them, he, acting for the company, continued Saint in its employment, and committed other funds to him, which were also converted; and that this action of Walls discharged them from all liability for funds thus converted after he knew of Saint's dishonesty. The general principle here relied on finds abundant support in the authorities. In the leading case of *Phillips v. Foxall*, L. R. 7, Q. B. 666, the proposition is thus stated by Quain, J.:

"We think that in a case of continuing guaranty for the honesty of a servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guaranty relates, and if, instead of dismissing the servant, as he may do at once and without notice, he chooses to continue in his employ a dishonest servant, without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service."

And this proposition is rested upon considerations which, to our minds, are eminently satisfactory. Premising that had a default involving dishonesty, and occurring before the surety became bound, been known to the creditor, and concealed by him from the surety, the effect would have been to discharge the surety,—a doctrine which appears to be well established,—the court proceeds to declare the same result from a concealment of dishonesty pending a continuing guaranty, as follows: "One of the reasons usually given for the holding that such a concealment (at the time the surety enters into the obligation) would discharge the surety is that it is only reasonable to suppose that such a fact, if known to him, would necessarily have influenced his judgment as to whether he would enter into the contract or not; and, in the same manner, it seems to us equally reasonable to suppose that it never could have entered into the contemplation of the parties that after the servant's dishonesty in the service had been discovered the guaranty * * * should continue to apply to his future conduct, when the master chose, for his own purpose, to continue the servant in his employ, without the knowledge or assent of the surety. If the obligation of the surety is continuing, we think the obligation of the creditor is equally so, and that the representation and understanding on which the contract was originally founded continue to apply to it during its continuance and until its termination."

The citations supporting this conclusion are quasi dicta of Lord Redesdale in *Smith* v. *Bank*, 1 Dow. 287, and of Malins, V. C., in *Burgess* v. *Eve*, L. R. 13, Eq. 450; but the case was subsequently followed in England and the United States, and nowhere abstractly doubted. We follow these authorities and adopt their conclusions as sound in principle.

Sanderson v. *Aston*, L. R. 8 Exch. 73; Brandt, Sur. Sec. 368; *Roberts* v. *Donovan*, 70 Cal. 108, 11 Pac. R. 599; *Railroad Co.* v. *Gow*, 59 Ga. 685; *Telegraph Co.* v. *Barnes*, 64 N. Y. 385; *Newark* v. *Stout*, 52 N. J. Law, 35, 18 Atl. 943.

Indeed, the foregoing doctrine is not controverted in this case, but it is contended that it has no application as between a corporation, being the creditor, and the surety of one of its officers or employes; and there are not a few adjudged cases which support this view. The argument upon which this conclusion is reached is that "corporations can act only by officers and agents. They do not guaranty to the sureties of one officer the fidelity of the others. The fact that there were other unfaithful officers and agents of the corporation, who knew and connived at his (the principal's) infidelity, ought not in reason, and does not in law or equity, relieve the sureties from their responsibility for him. They undertake that he shall be honest, though all around him be rogues. Were the rule different, by a conspiracy between the officers of a bank or other moneyed institution all their sureties might be discharged. It is impossible that a doctrine leading to such consequences can be sound."

Railway Co. v. *Shaeffer*, 59 Pa. St. 356; *Taylor* v. *Bank*, 2 J. J. Marsh, 565; *McShaney* v. *Bank*, (Md.) 20 Atl. 776; Brandt, Sur. Sec. 369.

It is to be noted that these cases—and there may be others which follow them—hold, not only that, where there is a conspiracy between the officers of a corporation to embezzle its funds, the dereliction of neither officer will discharge the sureties of the other, but also where there is a negligent failure on the part of one such officer to give notice to the sureties of another of his dishonesty, and a continuance of the dishonest servant in the corporate service without the assent of his sureties, given with a knowledge of the default, the sureties are not discharged from liability for subsequent deficits, though confessedly they would be were the creditor an individual or copartnership. It may be that the first position stated is sound. It would seem to be immaterial whether an original default results from the dishonesty of the principal alone, or conjointly from his and the dereliction of another corporate employe. The sureties are bound to answer for the results of any form of original dishonesty. That is what they insure against. It may be, too,—doubtless would be,—that no concealment by a conspirator of the fact of the principal's original default, no continuance in the service by an officer of the corporation in pari delicto with the principal, would suffice to discharge the surety, since all of this is malversation participated in by the principal, and violative of the contract which the sureties have undertaken to see faithfully performed. Moreover, the acts and omissions of one agent of a corporation, in conspiracy with another to filch their common master, in furtherance of their nefarious purposes, are, in the nature of things, without authorization, by implication or otherwise, and can in no just sense be said to be acts or omissions of the corporation. Upon this idea, it may be that where one officer, though not originally participating in the default of another, conceals that default from the sureties of his fellow-officer and from the company for sinister purposes of his own, and not as representing his employer or in its interest, and continues the defaulting officer in the service, the sureties would not be discharged as to subsequent deficits. This far we may go with the learned courts in which the cases we have cited were decided. But even our conservatism in following adjudications of courts of acknowledged ability and learning can in no degree constrain us to adopt the second proposition stated above. We cannot subscribe to the doctrine that there is the radical difference insisted on, or any material difference in fact, between the efficacy of acts and omissions of an agent of a creditor corporation, having authority in the premises, on the one hand, and the acts and omissions of the agent of an individual creditor, or of the individual himself, on the other, in respect of condoning the defalcation of an employe, omitting notice to the employe's sureties, and continuing him in the service, to operate a release of the sureties as to subsequent deficits of the dishonest employe. No doctrine of the law is more familiar than that notice to an agent, within the scope of his agency, is notice to the principal: and the doctrine has in no connection been applied more frequently and uniformly than to corporations and their agents. Indeed, there is an absolute necessity in all cases for its application to corporations, since they act and can be dealt with only through agents. Notice to one agent of a corporation with respect to a matter covered by his agency must be as efficacious as to its directors or to its president, since these also are only agents, with larger powers and duties, it is true, but not more fully charged with respect to the particular thing than he whose authority is confined to that one thing. In the case at bar, Walls had authority to make the contract with Saint, subject to the approval of another agent of the corporation. He did in fact make it. This contract contained a provision for its termination by either party at pleasure. The evidence was that Walls had full supervision over Saint, and over all matters embraced in the contract made by Saint. It was at least a fair inference to be drawn by the jury that he could terminate the employment, either under the stipulation in the instrument, or for a violation of it by Saint, subject to the approval of the other officer or agent referred to. There is no ground to doubt but that to have given the sureties notice of Saint's default would have been in the line of his duty and authority. Equally clear it must be that their assent to him to a continuance of Saint's employment would have bound them for the subsequent defalcation; and on the other hand it must be that their dissent from such continuance, communicated to him, would have had the same effect as had it been given to any other officer of the creditor company. He had notice of the default. He received it as representing the company. In that capacity, he condoned it, made arrangements with Saint to make it good, continued the employment, and thereby continued Saint's opportunities to embezzle the company's funds, on the supposed security for its reimbursement afforded by the obligation of the sureties, who had contracted on the assumption of Saint's honesty, and were entitled to know of his dishonesty, when it should develop, as a condition to their subsequent liability. There is no intimation of connivance or conspiracy on the part of Walls with Saint to defraud either the creditor or the sureties. What he did was doubtless done in good faith, and for the interest, as he supposed, of his employer. It was in the line of his employment. If his further duty was to report his action to another officer of the company, the presumption is that he made such report. There is nothing in the record to rebut such presumption. We cannot hesitate to affirm, on this state of the case, that what he did which ought not to have been done, and what he failed to do which ought to have been done, were the acts and omissions of the corporation, involving the same consequences, in all respects as if the corporate entity had been capable of direct personal action, so to speak, and had acted as he did, or as if he himself, and not the Wheeler & Wilson Mfg. Co., had been the creditor. We suppose it would not be contended in any quarter, that if these sureties had in terms stipulated that, in case of Saint's default, notice to them, and assent on their part, should be a condition precedent to their liability for further defaults, they could be held, without such notice and assent, and yet, under the doctrine announced in the cases cited, such a stipulation would be entirely nugatory, and the failure of every agent and officer, all with knowledge of the stipulation and of the default, to notify the sureties thereof, would avail them nothing. Yet it would manifestly be no more the duty of the corporation to give a notice so stipulated for than to give a notice made a part of the contract by the law of the land. And such doctrine, carried to its legitimate results, would defeat all corporate liability growing out of the contracts, acts, and omissions of agents clothed with power and authority in the premises. That it is unsound is demonstrated, not only in logic, but upon analogous authority. As we have seen, the English court, in the leading case of *Phillips* v. *Foxall, supra*,—which has never been called in question there or in this country, either as to the result or the reasoning upon which it was reached,—supported the principle declared upon the same considerations which underlie the doctrine that if an employer have knowledge of the previous dishonesty of a servant, and accept a guaranty for his future honesty without disclosing such knowledge to the surety, this is a fraud upon the latter, and he is not bound. Now, suppose an officer of a corporation, charged with the duty of finding surety for another officer, knowing of such previous dishonesty on the part of such other officer, takes bond for his faithful and honest performance of the services contracted for, without giving the surety notice of the prior dereliction. Would not that omission of duty on his part stand upon the same plane before the law, and involve precisely the same consequences, as if the default had occurred after the surety has bound himself, and the officer had then failed to give him notice of it? If the corporation is not prejudiced by the omission in one instance, can it be in the other? If the corporation is responsible for the dereliction of its agent with respect to notice of a previous default, would it not also be responsible for its agent's failure to give notice of the subsequent default? There can, in our opinion, be but one answer to these questions. There can be no possible difference in the duty of the agent and the corporation's liability for its non-performance in the two cases; and the law is well-settled that the failure of the agent of a corporation to give notice of such previous dishonesty avoids the obligation of the sureties for future misconduct. Singularly enough, too, some of the cases holding this doctrine distinctly and broadly were decided by courts—those of Pennsylvania and Kentucky—which hold the contrary view as to notice of after-occurring embezzlement.

Brandt, Sur. Sec. 365–368; *Wayne* v. *Bank,* 52 Pa. St. 344; *Graves* v. *Bank,* 10 Bush, 23; *Bank* v. *Cooper,* 36 Me. 179, 39 Me. 542.

Our conclusion on this point is further supported by the cases of *Railroad Co.* v. *Gow*, and *Telegraph Co.* v. *Barnes, supra*, which, without discussing this point, in effect hold that the omission of an officer of a corporation to notify a surety of the default of his principal in a case like this, and the continuance by such officer of the employment of the principal, will discharge the surety as to all defaults arising during the subsequent service. And in *Newark* v. *Stout,* 52 N. J. Law, 35, 18 Atl. 943, the New Jersey court, while adhering generally to the doctrine we have been criticising, yet held that if the default and dishonesty of a municipal officer be brought to the attention of the city council, which is clothed with the power to remove him, and he is allowed to continue in the service without notice to and assent on the part of the surety, the latter will be discharged from liability as to all subsequent defaults. It does not appear to have been so considered by that court; but it is manifest that this is a radical departure from the doctrine held by the Pennsylvania, Kentucky, Maryland, and other courts, and relied on by appellee here, and goes strongly in support of the contrary rule, which we believe to be the sound one. It is also to be noticed that much reliance is had by the courts holding that a surety of one officer of a corporation is not discharged by the acts or omissions of another, in the particulars under consideration, on cases decided by the supreme court of the United States in respect of sureties of public officers. Indeed, it would seem that this whole doctrine had its inception in this class of cases. This can but be considered an infirmative circumstance, going to the soundness as authority of those cases which involve sureties of corporation officers. There is a palpable and manifest distinction between the two classes of cases bearing directly upon this question, which, while requiring the application of this rule to public officers on the grounds of public policy, and that laches should not be imputed to the government, does not require its application to officers of corporations.

We hold that if Walls, while acting for the corporation and in the capacity of its agent, with respect to the matters and things involved in Saint's contract, received notice of such a conversion of its funds by Saint as amounted to embezzlement or involved dishonesty, and, without imparting this knowledge to the sureties and receiving their assent thereto, continued him in the service, the sureties are not liable for Saint's subsequent defaults. Charges 5, 9 and 7, requested for defendants, when referred to the evidence, were correct expositions of the law, as we understand, in this connection. The refusal of the court to give them involved error which must work a reversal of the case. Most of the other assignments of error are covered by the points considered in the first part of this opinion. Such of the assignments as are not discussed have been considered, and found to be without merit. The judgment is reversed, and the cause remanded.

CASS *vs.* SHEWMAN (1891).

61 Hun. 472; 16 N. Y. Supp. 236.

Appeal from special term, Schuyler county.

Action by Marcus M. Cass against James Shewman to recover on a guaranty to fulfill the conditions of a lease not complied with by the lessee. Plaintiff demurred to defendant's answer. The demurrer being overruled, plaintiff appeals. Reversed.

On the 3d April, 1888, the plaintiff and one Jennie D. Shewman entered into a written agreement, by which the plaintiff leased to said Shewman his farm of 110 acres for the term of three years from April 1, 1888, at the annual rent of $125, payable on the 1st of March of each year. It was, among other things, provided that Shewman, the party of the second part, should have "firewood and privilege to cut and use posts for fencing on said farm, but shall not cut standing timber until down timber is used up;" and the party of the second part agreed to carry on the farm in a good and farmer-like manner. Upon the same occasion and in connection with said lease, the defendant executed and delivered to plaintiff an instrument, of which the following is a copy:

> "For a valuable consideration to me paid by M. M. Cass, the receipt whereof is hereby acknowledged, I hereby agree to become security for the fulfillment of the above lease by the party of the second part, hereby agreeing to fulfill all the terms and conditions of said lease not fulfilled by said party of the second part.
>
> "Witness my hand this 3rd day of April, 1888.
>
> "JAMES SHEWMAN."

In the complaint the lease and the guaranty of the defendant are set out, and it is alleged that the lessee went into possession, and that the year's rent of $125 that became due March 1, 1891, has not been paid. It is also alleged that the lessee has not carried on the farm in a good and farmer-like manner, has committed waste, has torn down and injured fences, has injured the buildings, and has cut down and appropriated many standing trees, contrary to the provisions of the agreement, thereby damaging the plaintiff to the amount of $300, which, by the terms of the agreement, the lessee is liable to pay; that in these respects the lessee has made default, and has failed to fulfill the agreement. Judgment is demanded against the defendant for $425. In the fifth count or defense in the answer it is alleged by the defendant that no demand was made by plaintiff before the commencement of this action of said lessee for the payment of said rent, or for the performance on her part of the conditions and provisions in said lease contained, alleged in the complaint to have been broken and violated by her, or for compensation in damages for such alleged breach, or for the injury as alleged to the real property; that plaintiff had taken no steps and resorted to no legal remedy against the lessee to recover the said rent, and for damages for a breach of performance of the conditions of the agreement, and had not exhausted his remedies, legal or otherwise, against the lessee. In the seventh count or defense the defendant alleged that the lease or agreement set forth in the complaint was void, for the reason that it was not sealed, acknowledged or witnessed. The plaintiff demurred to the fifth and seventh defenses in the answer on the ground that each of said answers is insufficient in law upon the face thereof, and neither contains sufficient facts nor allegations to constitute a defense. The court in its decision sustained the demurrer to the seventh defense, giving the defendant leave to amend on payment of costs of the demurrer, but overruled the demurrer to the fifth defense, and directed an interlocutory judgment to that effect. The court at the same term granted an order, which was entered July 2, 1891, directing that the demurrer to the fifth count be overruled, and that "the defendant may enter judgment herein, dismissing said complaint with costs, which judgment shall stand upon the record until the trial of the issue joined in this action, and, in case said action shall be determined in favor of the defendant, said judgment, together with judgment for further costs, shall stand as the final judgment in this action, otherwise to be of no force and effect."

This order and the judgment entered in pursuance thereof on the 6th July, 1891, are appealed from.

Argued before HARDIN, P. J., and MARTIN and MERWIN, J. J.

M. M. Cass, Jr., for appellant.

Cole & Bolyen, for respondent.

MERWIN, J. No exceptions to the decisions of the court were filed by the appellant, and the respondent therefore claims that the appellant is not in a position to question the correctness of the decision. The cases cited to sustain this view of the practice relate only to trials of issues of fact. By Sec. 992 of the Code of Civil

Procedure it is provided that "an exception may be taken to the ruling of the court or of a referee upon a question of law arising upon the trial of an issue of fact." The manner in which such exceptions shall be taken is regulated by sections 994 and 995. We are referred to no provision of the Code, or to any authority, which requires exceptions to be taken to the decision of the court on the trial of an issue of law. Under the former Code, the practice, as understood, did not require exceptions in such a case. 3 Wait, Pr. 232. We think none were necessary.

Upon the merits of the demurrer, the claim of the respondent, as indicated by his points, is that he is not liable until a demand is made upon the principal debtor, and that "it must be shown that she refused to fulfill the covenants, and the surety must have previous notice, and a demand must also be made on him, so that he may have knowledge of the breach, and an opportunity to fulfill himself." To sustain this view the cases of *McMurray* v. *Noyes,* 72 N. Y. 523; *Toles* v. *Adee,* 91 N. Y. 562; *Bank* v. *Livingston,* 2 Johns. Cas. 409; *Ins. Co.* v. *Ogden,* 1 Wend. 137, are cited. In the McMurray case the defendant, upon an assignment of a bond and mortgage, covenanted that if, in case of foreclosure and sale of the mortgaged premises, there should arise a deficiency, he would pay the same on demand. In an action on this guaranty it was held that the foreclosure and sale were conditions precedent, to be performed with due diligence in order to establish the liability of the guarantor. *Toles* v. *Adee* was an action upon an undertaking given upon the discharge of a defendant from an order of arrest, and conditioned that the party discharged would at all times hold himself amenable to process issued to enforce the judgment. It was held that the entry of judgment and issuing of process against the principal debtor were conditions precedent to the liability of the surety, and that a neglect to perform such conditions with due diligence discharged the surety. In *Bank* v. *Livingston* there was an absolute guaranty of repayment of certain moneys advanced to a committee. The only question raised was whether the committee should have been first sued, and it was held that this was not necessary. In *Ins. Co.* v. *Ogden* the defendant had assigned to plaintiff certain contracts, and covenanted that the sum set opposite to each contract in a statement annexed was then justly due thereon, and that "each and every sum should be well and truly paid to the plaintiffs, with the interest on each respectively." It was held that plaintiffs could not call on defendant for payment without first making demand of those who signed the contracts, but that it was not necessary to bring suit against them. The first two cases are clearly distinguishable from the present. In those something was to be done by the creditor before the liability of the surety was determined. Here the liability attached and was determined the moment the lessee failed to perform his duty, and the liability of the surety was as extensive as that of the lesee. Poth. Obl. 404. The case in 1 Wend. sustains somewhat the position of the defendant, but other cases are in a different direction. In *Allan* v. *Rightmere*, 20 Johns. 365, there was a guaranty by the defendant of the payment of a note, and it was held not to be necessary to make a demand of the maker before suing the defendant; it being said that the undertaking of the defendant was that the maker should pay the note when due, or that the defendant would pay it himself.

The doctrine of this case was followed and established by the court of appeals in *Brown* v. *Curtiss*, 2 N. Y. 225. In *Mann* v. *Eckford's Exrs.*, 15 Wend. 502, the obligation sued on was a bond of defendant's testator, conditioned that one Gibbons "should punctually satisfy and pay to the Aetna Ins. Co." the amount of a certain bond and mortgage executed by Gibbons, and upon which the company had advanced the money, with interest as the same should become due. It was held not to be necessary for the plaintiff to prove a demand upon Gibbons for payment of the money and notice to the obligator or to defendants, it being said that, if a person make an unconditional engagement for the act of a third person, the contract will be broken if that person fails to do the act. In *Douglas* v. *Howland*, 24 Wend. 35, there was an agreement between plaintiff and one Bingham, whereby, among other things, Bingham agreed to pay the plaintiff such sum as should be found due upon an accounting provided for in the agreement. Underneath the agreement the defendant executed an instrument by which he covenanted that Bingham should "well and faithfully perform on his part the above agreement," it was held that defendant was not entitled to notice before action of Bingham's default. Among other cases there cited was the case of *Brookbank* v. *Taylor*, Cro. Jac. 685, where the promise was that the defendant would pay the plaintiff the rent due from another, if the latter did not pay it, and it was held that the defendant must notice the non-payment at his peril.

In *Bank* v. *Rogers,* 7 Bosw. 493, the plaintiff made a loan to one Chase, payable in 60 days, and the defendant promised that, if Chase failed to repay the amount, with interest, within 60 days, "then and in such case the defendant will become answerable to the plaintiffs for such repayment after 30 days' notice of such default." It was held that a demand of the principal need not be made before suit against the defendant.

In *Clark* v. *Burdett,* 2 Hall, 217, there was a guaranty by defendant of payment of bills of merchandise purchased or to be purchased, and it was held that a demand of the purchaser and notice to defendant were not necessary as conditions precedent to the plaintiff's right of action.

In *Turnure* v. *Hohenthal,* 36 N. Y. Super. Ct. 79, where a surety to a lease bound himself that, in case default should at any time be made by his principal in payment of rent and in the performance of the conditions of the lease to be by him performed, he would pay the rent in arrear, and all damages in consequence of the non-performance of the covenants, without requiring any notice of such default, it was held that no demand was necessary to be made of the tenant by the landlord for the rent before proceeding against the surety, and that the landlord was under no obligation to attempt to collect the rent or enforce the covenants against the tenant. A like view was taken in *McKenzie* v. *Farrell,* 4 Bosw. 204, and in *Ducker* v. *Rapp,* 41 N. Y. Super. Ct. 235.

In *Cordier* v. *Thompson,* 8 Daly, 172, one Ferrero executed an instrument by which she agreed to return to plaintiff's intestate a certain amount of money at a certain time, and the obligation of the defendant was in the following form: "I guaranty the above obligation." This was held to be a guaranty of payment, and that neither demand on the principal nor notice to the guarantor of default were prerequisite to an action on the guaranty.

Voltz v. *Harris,* 40 Ill. 155, was an action upon a guaranty of a lease, by which the guarantor became "security" that the lessee would do and perform all the covenants contained in the lease, and promised to pay to the lessors all rents and damages the lessors might sustain by reason of the non-compliance with or non-fulfillment of the stipulations of the lease by the lessee. It was held that the liability of the guarantor was primary, and that he was not entitled to notice of the non-performance of the stipulations.

In *Ashton* v. *Bayard,* 71 Pa. St. 139, the obligation against the surety was: "I hereby become the surety of S. Coulter for the fulfillment of the within obligation." This referred to a due-bill given by Coulter for certain shares of stock. This was held to be an original undertaking by the surety, and a recovery thereon could be had without proving diligence to pursue Coulter. See also Brandt, Sur. Sec. 86, 172.

In the present case, as against the lessee, no demand was necessary. *Jackson* v. *Binns*, 10 Wkly. Dig. 105; *McMurphy* v. *Minot*, 4 N. H. 251.

His agreement was broken when he failed to pay, and when he violated the conditions of the lease. The defendant agreed to fulfill all the terms and conditions not fulfilled by the tenant. This was, in effect, an agreement to pay if the lessee did not. When the plaintiff shows a breach by the lessee, and non-payment, or non-fulfillment, then he shows all that by the terms of the contract he is required to show in order to make the defendant liable. The agreement of defendant was not that the lessee would pay on demand or upon suit brought, but it was absolute that he would fulfill if the lessee did not. This, in substance, was a guaranty of payment, and not of collection. The defendant, in his agreement, required no demand or notice or exhaustion of remedies against the tenant. No duty was imposed on the lessor in the first instance to take any steps against the debtor, and that is said to be the test in order to examine whether a guaranty of payment or collection exists. *Toles* v. *Adee*, *supra*.

The contracts of sureties are to be construed like other contracts, so as to give effect to the intention of the parties. *People* v. *Backus*, 117 N. Y. 201, 22 N. E. 759.

It is hardly to be assumed here, in the absence of an express stipulation to that effect, that the intention of the parties was that the lessor should pursue the lessee to the end of an execution before calling upon the surety. In fact, that does not now seem to be claimed by the respondent's counsel, but he relies on the question of demand and notice. This the defendant did not require by his agreement, and he was not entitled to it, any more than in case of an absolute guaranty of payment. This view is, I think, in accordance with the current of authority, as illustrated by the cases above referred to. Judgment and order reversed, with costs of appeal, and interlocutory judgment ordered for the plaintiff upon the demurrer, with costs, with leave to the defendant to answer in 20 days upon the payment of the costs of the demurrer and of the appeal. All concur.

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CAMPBELL *vs.* SHERMAN (Homet's Appeal) (1892).

151 Pa. St. 70; s. c. *sub nom.* in re Sherman's Estate (Appeal of Homet), 25 Atl. 35.

Appeal from court of common pleas, Sullivan county; John A. Sittser, Judge.

Contest between J. A. Homet, claimant, and other lien creditors of Adam Sherman, upon distribution of a fund arising from a sheriff's sale of the real estate of said Sherman. From a judgment allowing Homet's claim in part only, he appeals. Reversed.

J. G. Scouten, for appellant.

E. M. Dunham, for appellee.

McCOLLUM, J. On the first of January, 1887, J. A. Homet, the appellant, bought of Adam Sherman two judgments against A. R. Robbins, on which there was then an unpaid balance of $592.38, and they were duly assigned to him. At the same time he loaned to Sherman $266.62. To secure the payment of the judgments and the money loaned he received the bond of Sherman in the sum of $859, on, which, by virtue of the warrant of attorney contained therein, judgment was entered Jan. 3, 1887. On a distribution of the proceeds of a sale by the sheriff on the 13th of September, 1890, of the real estate of Sherman, the appellant claimed to apply on his judgment the fund remaining after paying costs and prior liens. The subsequent lien creditors of Sherman admitted that the appellant was entitled to receive the sum loaned, with interest thereon, but contended that Sherman was released from liability as to the balance because of the appellant's failure to revive the Robbins judgments. To this the appellant answered that his omission to revive these judgments did not release Sherman, and that, if it did, the creditors could not take advantage of it on distribution. The conclusion reached by the learned auditor was that he could not, at the instance of the lien creditors, set aside or disregard the judgment on the showing before him, but that Sherman might, in an appropriate proceeding, rely on the appellant's negligence as a defense to it. The learned president of the common pleas thought that this defense could be successfully made before the auditor by the lien creditors, and the fund was accordingly awarded to them.

In reviewing the decision of the court below, the first important inquiry is whether the obligation of Sherman in respect to the Robbins judgments was that of a surety or of a guarantor. If he was a surety, he was not released from liability by the negligence of the appellant, and the contention concerning the powers of the auditor has nothing to rest upon. It is well settled that mere forbearance, however prejudicial to a surety, will not discharge him, and that the failure of a creditor to revive a judgment does not release the surety, unless there was an express agreement that it should be kept revived for his benefit. *Winton* v. *Little,* 94 Pa. St. 64; *U. S.* v. *Simpson,* 3 Pen. & W. 437.

We think the undertaking of Sherman was that of a surety. His bond included the money loaned and the balance due on the Robbins judgments, and by its express terms was to remain in force until the whole sum was paid. The written conditions in the bond define the liability of the obligor, and we cannot add to them by implication a condition which would render them nugatory. The written condition applicable to this contention is that, if the judgments "shall be paid in full by the said A. R. Robbins, his heirs and assigns, to the said J. A. Homet, then this obligation to be void, otherwise to be and remain in full force and virtue."

The appellant purchased the judgments on the agreement of his vendor to pay them if Robbins did not. It was a contract of suretyship, and not of technical guaranty, on which he parted with his money. On the failure of Robbins to pay the judgments at maturity, he was at liberty to proceed directly against the surety. He was not bound to resort to legal proceedings against Robbins or to show that they would have been unavailing in order to sustain process upon the bond. He was under no legal duty to the surety to revive the judgments, unless requested to do so, and, as no such request was made, negligence in this particular cannot be imputed to him. The law on this subject is stated by Agnew, J., in *Reigart* v. *White,* 52 Pa. St. 440, as follows:

"A contract of suretyship is a direct liability to the creditor for the act to be performed by the debtor, and a guaranty is a liability only for his ability to perform this act. In the former the surety assumes to perform the contract of the principal debtor if he should not, and in the latter the guarantor undertakes that his principal can perform—that he is able to do so. From the nature of the former, the undertaking is immediate and direct that the act shall be done which if not done makes the surety responsible at once; but, from the nature of the latter, non-ability, in other words insolvency, must be shown."

In *Kramph's Ex'x* v. *Hatz's Ex'rs,* Id. 525, Woodward, C. J., discussing the same subject said: "The contract of a guarantor is to be carefully distinguished from that of a surety, for whilst both are accessory contracts, and that of a surety in some sense conditional, as that of a guarantor is strictly so, yet mere delay to sue the principal debtor does not discharge a surety. The surety must demand proceedings, with notice that he will not continue bound unless they are instituted. *Cope* v. *Smith,* 8 Serg. & R. 110.

By his contract he undertakes to pay if the debtor do not; the guarantor undertakes to pay if the debtor cannot. The one is an insurer of the debt; the other, an insurer of the solvency of the debtor. It results as a matter of course out of the latter contract that the creditor shall use diligence to make the debtor pay, and, failing this, he lets go the guarantor." The foregoing extracts from the opinions of eminent Pennsylvania jurists draw with remarkable clearness and precision the distinction between a contract of suretyship and a contract of guaranty, and accurately define the respective rights and obligations of a surety and a guarantor. There has been no departure by this court from the principles announced in them, and they sustain the contention of the appellant that his omission to revive the Robbins judgment did not affect Sherman's liability on his bond. It follows that it was error to award the fund to the subsequent lien creditors.

Decree reversed, and record remitted to the court below, with direction to distribute the fund in accordance with this opinion; the costs of this appeal to be paid by the appellees.

Deobold *vs.* Opperman *et al* (1888).

111 N. Y. 531, 19 N. E. 94.

Appeals from Supreme Court, general term, First Department.

Actions by Philip Deobold, executor of the will of Maria Deobold, deceased, against Frederick Opperman, Jr., and another, sureties on the bond of Louisa Deobold (now Rausch), administratrix of Henry Deobold, deceased. In both cases judgments were rendered for the plaintiff, and affirmed on appeal to the general term. Defendants again appeal.

Ashbel P. Fitch, for appellants.

George F. Langbein, for respondent.

RUGER, C. J. This action was brought by the plaintiff as executor of the estate of his mother, Maria Deobold, to recover from the defendants as sureties upon the bond of Louisa Deobold, given upon her appointment as administratrix of the estate of her husband, Henry Deobold, a sum of money ordered by the surrogate to be paid to Maria Deobold as mother and next of kin to the intestate, but which the administratrix refused or neglected to pay. The trial court directed a verdict for the plaintiff, and the judgment entered thereon was affirmed upon appeal. The supreme court having granted leave to appeal to this court, the matter comes here for review. The record presents the following facts, the evidence being practically undisputed: Prior to January 16, 1880, Henry Deobold, a resident of the city of New York, died possessed of personal property of about the value of $3,300, and leaving him surviving his widow, Louisa Deobold, his mother, Maria Deobold, and brother, Philip Deobold, next of kin. On that day the surrogate of New York issued letters of administration upon the estate to the widow, Louisa Deobold, and the defendants became sureties upon her bond for the faithful performance of her duties as such. On December 9, 1882, upon a general accounting before the surrogate by the administratrix, he made a decree finally adjusting her accounts, and discharging the administratrix and her sureties from their bond. This decree purported to have been based upon a written waiver of notice of the settlement of the estate, signed by Maria and Philip Deobold, and a written assignment by them to the administratrix of all their right, title and interest in the estate of the deceased. Proceedings were thereafter begun by Maria and Philip in the surrogate's court, on Jan. 9, 1883 to set aside the decree rendered on final accounting, upon the ground that it was fraudulently obtained, and that the assignment and waiver of citation were procured from them by the administratrix through fraud and misrepresentation. Such proceedings were thereupon had that the surrogate, on Feb. 20, 1883, made an order vacating, and in all respects setting aside the decree, and the defendants were immediately thereafter served with a copy of such order. Subsequently, upon a further accounting, the surrogate made an order directing the administratrix to pay to Maria Deobold the sum of $200, and she refusing to pay the same, the surrogate made a further order directing the prosecution of the defendant's bond for the recovery of the amount so ordered to be paid. This suit was brought in pursuance of the latter order.

It further appeared that, before consenting to act as sureties upon the bond of Louisa Deobold, the defendants required her to deposit with them the entire proceeds of the estate, to be retained until they were discharged from liability upon the bond, and an agreement to that effect was made between her and the defendants. No security was given to the administratrix for the repayment of those moneys by the defendants, and by the understanding of the parties they were to pay interest thereon, and were authorized to use them in their business as brewers. Under this arrangement the administratrix, at the time of the execution of the bond, deposited with the defendants the sum of $3,300, the funds of the estate, which they employed in their business until Jan. 16, 1883, when it was repaid by them, together with a loan of $2,900 and interest, to Louisa Deobold. This payment was made by the defendants after an examination of the decree of the surrogate of Dec. 9, 1882, discharging them from liability on the bond, and after an inspection of the papers upon which such decree was founded. It did not appear that the defendants had actual notice of the proceedings previously instituted by Philip and Maria Deobold to set aside such decree for fraud, or that they were made parties thereto. It further appeared that, in actions instituted on behalf of Philip and Maria Deobold against the administratrix in the court of common pleas of New York, judgments had been obtained by the plaintiffs, respectively, vacating and setting aside the assignments before referred to as fraudulent and void.

Two questions are presented by the appellants as grounds for the reversal of the judgment below, which may be briefly stated as follows: (1) That the surrogate could not reinstate the defendants in their liability as sureties upon their bond in proceedings to which they were not parties; and (2) that the agreement by which they were made the custodians of the funds of the estate was binding and lawful, and authorized them to retain them until after the discharge of such bond. As the corollary of the latter proposition, it is urged that, having the right to retain them, and having paid them out relying upon the assignment, and decree of the surrogate based thereon, the defendants were relieved from the obligation of repaying the same moneys in this action.

We are of the opinion that the claims of the defendants are not maintainable. No question is made but that the surrogate had ample power to set aside his decree for fraud, and require a further accounting by the administratrix as to the estate (Sec. 1, c. 359, Laws 1870); but the claim is that the sureties were not bound by the subsequent adjudications of the surrogate, for the reason that they did not have notice of the proceeding. The claim is clearly untenable. The decree discharging the administratrix and her sureties was, when made, assailable by any party thereby aggrieved, either by motion to set it aside or by proceedings on appeal. In neither case was it necessary that the sureties should have notice of the proceeding. The sureties are the privies of the administratrix, and are precluded from questioning any lawful order made by the surrogate in a proceeding wherein she is a party, if obtained without collusion between such administratrix and the next of kin or creditors of the estate. *Scofield* v. *Churchill*, 72 N. Y. 565; *Gerould* v. *Wilson*, 81 N. Y. 583.

Their bond contemplates that they shall remain sureties as long as the surrogate retains jurisdiction of the proceedings in administration of the estate, and has power to make valid orders therein affecting the property administered upon.

Of course the sureties would not be bound by an order which the surrogate had no jurisdiction to make; but so long as his jurisdiction continues the liability of the sureties remains. The very language of the bond provides for orders made in proceedings *inter alios* and for the liability of the sureties for a non-performance by the administratrix of any decree or order made by the surrogate's court. The condition of the bond is that liability shall follow her infidelity to her trust, or disobedience of any lawful order or decree, whenever made in the proceedings. It was, we think, never heard of in practice that sureties on an administrator's bond should have notice of proceedings in the administration of an intestate's estate. It could not be claimed that these sureties were entitled to notice of an appeal from the surrogate's decree, or that if an appeal was taken from a decree in favor of an administrator, and the decree should be reversed, they would not still remain liable upon their bond. Such bonds are similar to those given in civil actions upon appeals and otherwise, and have always been held to abide the result of the action. * * * *

The bond in question was executed for the sole purpose of securing the persons interested in the property the administratrix was about to receive, from any loss which they might sustain through her misconduct or dishonesty, and the defendants were well aware of the character of the transaction. The defendants thereby contracted to become sureties for the faithful performance by her of her duties as such administratrix, and the beneficiaries of the estate thereupon became, under the theory of the law, entitled, not only to the security afforded by the bond, but also to that of the funds of the estate remaining in the hands of the administratrix. If this transaction is sanctioned, one of the securities that the law provides to such persons is entirely destroyed, and the funds of the estate are merged in the personal responsibility of the sureties alone, subject to the hazard and casualties which frequently attend persons engaged in trade. * * * *

But it is claimed that the surrender, after the decree canceling the administratrix's bond, of the funds of the estate held by the defendants to the administratrix, operates as a defense to this action. The principle upon which the appellants make this point is not very clearly presented in their points, and we are unable to see the exact theory upon which it is based. They do not claim that the plaintiff is estopped from alleging the invalidity of the assignment, or of the decree upon the faith of which the payment was made. They claim, however, that "of two innocent parties that one must suffer who puts it in the power of the third person to do the act which caused the injury." This contention is probably based upon the familiar maxim that, "When one of two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one, if either, whose act has enabled such fraud to be committed." 8 Abb. N. Y. Dig. "Maxims," 84, and volume 4, "Maxims," 382.

This maxim has been applied and illustrated in numerous cases in this state, among which are the following: *Spraights* v. *Hawley*, 39 N. Y. 441; *Moore* v. *Bank*, 55 N. Y. 41; *Griswold* v. *Haven*, 25 N. Y. 595; *Bank* v. *Monteath*, 26 N. Y. 505; *Sandford* v. *Handy*, 23 Wend. 268; *Root* v. *French*, 13 Wend. 572; *Voorhis* v. *Olmstead*, 66 N. Y. 116.

These cases generally relate to the authority of agents whose right to deal with the property of their principals was in dispute, and the maxim has been applied by reason of various peculiar circumstances which were deemed sufficient to preclude the principal from availing himself from the agent's want of actual authority; but the general principle involved has been applied in many cases where a loss has followed from the negligence of one party which enabled a fraud to be committed upon another. We are of the opinion that the maxim has no application to the case in hand, for the reason that no actionable fraud has been shown to have been committed upon the defendants in this transaction, nor has any loss accrued to them in consequence of the surrender of the money referred to. It is probably true that the defendants would not have surrendered to the administratrix the funds of the estate in their possession, or have repaid to her the debt which they owed her, except for the decree produced for their inspection; but it is also very clear that they had no right to retain such funds by virtue of their contract with the administratrix, and there was no intention to commit a fraud upon them by the administratrix in obtaining possession of the property to which she was legally entitled. She was entitled to the repayment of her loan as a matter of course, for she held a promissory note therefor payable on demand, and no possible defense could be made against its collection. Neither as we have seen, could they have resisted a claim made by her or others for the reclamation of the money of the estate. They have done nothing therefore in consequence of the decree, except what they were under legal obligation to do, and have therefore suffered no legal loss or injury from the transaction.

The surrender of the property in question would not even have furnished a good consideration for a promise made by the administratrix. *Vandervilt* v. *Schreyer*, 91 N. Y. 392.

It is of the very essence of an action of fraud or deceit that the same should be accompanied by damage, and neither *damnum absque injuria* nor *injuria absque damnum* by itself establishes a good cause of action. *Hutchins* v. *Hutchins,* 7 Hill, 104; *Michigan* v. *Bank*, 33 N. Y. 9.

Neither can a party claim to have been defrauded who has been induced by artifice to do that which the law would have otherwise compelled him to perform. *Thompson* v. *Menck,* 41 N. Y. 82; *Story* v. *Conger*, 36 N. Y. 673; *Randall* v. *Hazelton,* 12 Allen, 412.

The defendants may possibly lose the money which they pay in satisfaction of their bond, but this will result from their contract, and the confidence reposed by them in their principal, and not at all from the surrender of the property held by them. It is not probable, however, that they will lose anything, as, for all that appears, their principal is perfectly responsible, and liable to indemnify them for any sums they may be obliged to pay on her account. It affirmatively appears that in January, 1883, she not only had in her possession all the funds of the estate, but also the additional sum of upwards of $3,000, the result of her own savings during the preceding two or three years, and being an amount largely exceeding the liability of the defendants on their bond.

The main question in the case really seems to be, who shall pursue the administratrix for the moneys of the estate improperly retained by her? We think it is the duty of the defendants, as the object of their bond was to relieve the next of kin from the necessity of resorting to the personal liability of a dishonest, negligent, or absconding administrator. We are further of the opinion that the defendants are precluded from the benefit of the principal contained in the maxim by reason of the obligations of their bond. They are the privies of their principal, and the guarantors of her fidelity in the administration of her trust. The decree under which the defendants claim discharge from liability was procured by a fraud practiced upon the surrogate through the presentation of papers fraudulently obtained and used by her. It was against the perpetration of such frauds that the defendant's bond was intended to protect the beneficiaries of the estate. The defendants had covenanted that the administratrix should faithfully execute the trust reposed in her, and obey all lawful decrees and orders of the surrogate's court. When she obtained, through fraud, the order of the surrogate awarding the moneys of the estate to her, and canceling her bond, she violated the obligations of her trust, and the defendants became liable for the damages flowing from such breach of duty. That the defendants were deceived by the administratrix constituted no protection to them for they had guarantied that she should deceive nobody in the administration of her trust. The liability of the sureties is coextensive with that of the administratrix, and embraces the performance of every duty she is called upon to perform in the course of administration. It is quite absurd to say that the very fact which creates a cause of action against the sureties should also operate as a defense to them. They cannot stand as innocent parties in relation to an act which they have covenanted to the plaintiff, and all others interested, should never be performed, and they have sustained no legal loss when subjected to a liability which they agreed to assume in the event which is now alleged as the cause of their misfortune. We are therefore of the opinion that the judgments below should be affirmed, with costs.

The decision in action No. 2, between the same parties, is necessarily controlled by the determination in action No. 1, and the judgment in that case must therefore also be affirmed, with costs.

All concur, except Earl and Peckham, JJ., dissenting.

Note.—That part of the Court's opinion holding invalid the agreement by which the defendants were made custodians of the funds of the estate is omitted.

Smith vs. Shelden et al. (1876).

35 Mich. 42; 24 Am. Rep. 529.

C. & W. N. Draper & C. I. Walker, for plaintiff in error.

Meddaugh & Driggs, for defendants in error.

Cooley, Ch. J. The legal questions in this case arise upon the following facts:

Prior to June, 1867, Eldad Smith, Isaac Place, and Francis B. Owen were partners in trade under the firm name of Place, Smith & Owen, and as such became indebted to defendants in error in the sum of $969 on book account.

In the month mentioned the firm was dissolved by mutual consent, Place purchasing the assets of his copartners and agreeing to pay off the partnership liabilities, including that to the defendants in error. On the second day of the following month Place informed the defendants in error of this arrangement, and that he had taken the assets and assumed the liabilities of the firm, and they, without the consent or knowledge of Smith and Owen, took from Place a note for the amount of the firm indebtedness to them, payable at one day with ten per centum interest. They did not agree to receive this note in payment of the partnership indebtedness, but they kept it and continued their dealings with Place, who made payments upon it. The payments, however, did not keep down the interest. Place, in 1872, became insolvent and made an assignment, and Smith was then called upon to make payment of the note. This was the first notice he had that he was looked to for payment. On his declining to make payment, suit was brought on the original indebtedness and judgment recovered.

The position taken by the plaintiffs below was, that as they had never received payment of their bill for merchandise they were entitled to recover it of those who made the debt, the giving of the note which still remained unpaid being immaterial.

On behalf of Smith it was contended that, by the arrangement between Place and his copartners, the latter, as between the three, became the principal debtor, and that from the time when the creditors were informed of this arrangement they were bound to regard Place as principal debtor and Smith and Owen as sureties, and that any dealing of the creditors with the principal to the injury of the sureties would have the effect to release them from liability. And it is further contended that the taking of the note from Place, and thereby giving him time, however short, was in law presumptively injurious.

Upon this state of facts the following questions have been argued in this court:

1. Was the note given by Place in the copartnership name for the copartnership indebtedness, but given after the dissolution, binding upon Smith and Owen?

2. If Smith and Owen were not bound by the note, were they entitled to the rights of the sureties? And

3. Did the taking of the note given by Place discharge Smith and Owen from their former liability?

On the first point it is argued in support of the judgment that when a copartnership is dissolved the partner who is entrusted with the settlement of the concern should be held to have implied authority to give notes in settlement. On the other hand it is insisted that in law he has no such authority, and that if he assumes, as was done in this case, to give a note in the partnership name, it will in law be his individual note only.

Whatever might be the case if the obligation which was given had been a mere acknowledgment of the amount due, in the form of a due bill or I O U, we are satisfied that there is no good reason for recognizing in the partner who is to adjust the business of the concern any implied authority to execute such a note as was given in this case. This note was something more than a mere acknowledgment of indebtedness; and it bore interest at a large rate. It was in every respect a new contract. The liability of the parties upon their indebtedness would be increased by it if valid, and their rights might be seriously compromised by the execution of paper payable at a considerable time in the future if the partner entrusted with the adjustment of their concerns were authorized to make new contracts. It was assumed in *F. & M. Bank* v. *Kercheval*, 2 Mich. 506-519, that the law was well settled that no such implied authority existed, and we are not aware that this has before been questioned in this state. See *Pennoyer* v. *David*, 8 Mich. 407. We think it much safer to require express authority when such obligations are contemplated, than to leave one party at liberty to execute at discretion new contracts of this nature, which may postpone for an indefinite period the settlement of their concerns, when a settlement is the very purpose for which he is to act at all.

For a determination of the question whether Smith and Owen were entitled to the rights of sureties, it seems only necessary to point out the relative position of the several parties as regards the partnership debt. Place, by the arrangement, had agreed to pay this debt, and as between himself and Smith and Owen, he was legally bound to do so. But Smith and Owen were also liable to the creditors equally with Place, and the latter might look to all three together. Had they done so and made collections from Smith and Owen, these parties would have been entitled to demand indemnity from Place. This we believe to be a correct statement of the relative rights and obligations of all.

Now a surety, as we understand it, is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so. It is immaterial in what form the relation of principal and surety is established, or whether the creditor is or is not contracted with in the two capacities, as is often the case when notes are given or bonds taken; the relation is fixed by the arrangement and equities between the debtors or obligors, and may be known to the creditor, or wholly unknown. If it is unknown to him, his rights are in no manner affected by it; but if he knows that one party is surety merely, it is only just to require of him that in any subsequent action he may take regarding the debt, he shall not lose sight of the surety's equities.

That Smith and Owen were sureties for Place, and the latter was principal debtor after the dissolution of the copartnership, seems to us unquestionable. It was then the duty of Place to pay this debt and save them from being called upon for the amount. But if the creditors, having a right to proceed against them all, should take steps for that purpose, the duty of Place to indemnify, and the right of Smith and Owen to demand indemnity, were clear. Every element of suretyship is here present, as much as if, in contracting an original indebtedness, the contract itself had been made to show on its face that one of the obligors was surety merely. As already stated, it is immaterial how the fact is established, or whether the creditor is or is not a party to the arrangement which establishes it.

This view of the position of the parties indicates clearly the right of Smith and Owen to the ordinary rights and equities of sureties. The cases which have held that retiring partners thus situated are to be treated as sureties merely, have attempted no change in the law, but are entirely in harmony with older authorities which have only applied the like principle to different states of facts, where the relative position of the parties as regards the debt was precisely the same. We do not regard them as working any innovation whatever. The cases we particularly refer to are *Oakeley* v. *Pasheller*, 4 Cl. & Fin., 207; *Wilson* v. *Loyd*, Law R., 16 Eq. Cas., 60; and *Millerd* v. *Thorn*, 56 N. Y., 402.

And it follows as a necessary result from what has been stated, that Smith and Owen were discharged by the arrangement made by the creditors with Place. They took his note on time, with knowledge that Place had become the principal debtor, and without the consent or knowledge of the sureties. They thereby endangered the security of the sureties, and as the event has proved, indulged Place until the security became of no value. True, they gave but very short time in the first instance; but, as remarked by the vice chancellor in *Wilson* v. *Loyd*, L. R., 16 Eq. Cas. 60, 71, "the length of time makes no kind of difference." The time was the same in *Fellows* v. *Prentiss*, 3 Denio, 512, where the surety was also held discharged. And see *Okie* v. *Spencer*, 2 Whart., 253. But that indulgence beyond the time fixed was contemplated when the note was given is manifest from the fact that it was made payable with interest. In a legal point of view this would be immaterial, but it has a bearing on the equities, and it shows that the creditors received or bargained for a consideration for the very indulgence which was granted, and which ended in the insolvency of Place. When they thus bargain for an advantage which the sureties are not to share with them, it is neither right nor lawful for them to turn over to the sureties all the risks. This is the legal view of such a transaction, and in most cases it works substantial justice.

The judgment must be reversed, with costs, and a new trial ordered. The other Justices concurred.

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Kingsland, *et al.*, *vs.* Koeppe, *et al.* (1891).

137 Ill. 344; 28 N. E. 48.

Tenney, Hawley & Coffeen, for appellants.

S. P. Douthart, for appellees.

Craig, J. This was an action brought by Kingsland Bros. & Co., the appellants, against Koeppe, Schwuchon, Klinge, and Loring, to recover a balance due on certain promissory notes executed by the Lake View Electric Light Company, and payable to the plaintiffs. At the date of the execution of the notes by the corporation, the four defendants wrote their names across the backs of the notes, and they were sued in this action as guarantors. On the trial in the circuit court, one of the defendants, Loring, withdrew his pleas, and judgment was rendered against him by default for the full amount claimed by the plaintiffs. Nothing need therefore be said as to him at present. The other defendants claimed that they were not guarantors of the notes, and offered parol evidence to show what the contract was between them and appellants at the time they placed their names on the backs of the notes. The court admitted the evidence and, in the propositions of law submitted, held that it was competent to prove by parol evidence what the real contract between the parties was; and this ruling was approved in the appellate court. 35 Ill. App. 81.

Where the payee of a note indorses it by placing his name on the back of the instrument, a contract of indorsement is created; the liability assumed by the payee being established by the writing.

Parol evidence to change or vary the terms or conditions of a contract is not admissible. *Mason* v. *Burton,* 54 Ill. 353; *Johnson* v. *Glover,* 121 Ill. 283; 12 N. E. 257; *Jones* v. *Albee,* 70 Ill. 34; *Woodward* v. *Foster,* 18 Grat. 200.

But where a person who is not the payee of a promissory note, but a third party, places his name on the back thereof, a different question arises. In such case the rule long established in this state is that it may be shown by parol evidence what liability was intended to be assumed. In an early case (*Cushman* v. *Dement,* 3 Scam. 497) where a third party wrote his name across the back of a note, it was held that the indorsement was *prima facie* evidence of a liability in the capacity of a guarantor, but the legal presumption was liable to be rebutted by parol proof. In *Boynton* v. *Pierce,* 79 Ill. 145, where the obligation of a guarantor arose, it was expressly held that the presumption that a party, not the payee, who places his name on the back of a note is a guarantor, may be rebutted by parol evidence. In *Stowell* v. *Raymond,* 83 Ill. 120, where the question again arose, the same rule was declared. The question again arose in *Eberhart* v. *Page,* 89 Ill. 550, and in deciding the case it is said: The indorsement of a note in blank by a third party raises a presumption only that it is intended thereby to assume the liability of guarantor, which may be rebutted by proof that the real agreement between the parties was different. From the cases cited it is apparent that this court is fully committed to the doctrine that, when a third party writes his name across the back of a promissory note, the presumption from the indorsement is that he assumed the liability of guarantor; yet parol evidence may be introduced to prove what liability was in fact assumed. It is conceded in the argument of appellants that the cases cited fully establish the rule indicated; but it is insisted that these cases were virtually overruled by *Johnson* v. *Glover,* 121 Ill. 283, 12 N. E. 257. This is a misapprehension of the force and effect of that decision. In that case, Johnson, who was the payee of a note, indorsed it in blank, and the note subsequently fell into the hands of Glover, who sued Johnson as a guarantor; and it was held that he was not a guarantor, but an indorser, and that parol evidence was not admissible to vary or change the character of the liability he had assumed. It is there said: The general rule is that the name of the payee appearing on the back of the instrument is evidence that he is indorser, and proves that he has assumed the liability of an indorser as fully as if the agreement was written out in words (citing authorities). Parol evidence is no more admissible to contradict or vary this contract than any other written contract.

What was decided in this case, and what was said, had reference solely to the payee of a promissory note who had indorsed the note in blank, and had no bearing whatever upon the rights or obligations of a third party, who had placed his name on the back of a note. Moreover, it is manifest that there was no intention to overrule or modify the doctrine announced in *Boynton* v. *Pierce*, 79 Ill. 145; *Stowell* v. *Raymond*, 83 Ill. 120; and *Eberhart* v. *Page*, 89 Ill. 550,—from the ruling in *Bank* v. *Nixon*, 125 Ill. 618, 18 N. E. 203. This case was heard and decided some time after *Johnson* v. *Glover* had been decided, and the doctrine of Boynton, Stowell and Eberhart cases was approved, and those cases were cited as sustaining the rule announced. We think therefore that the ruling of the circuit court, in the admission of evidence, that the defendants might resort to parol evidence to prove what contract was made between the parties was correct. The signature of the defendants written on the back of the notes was prima facie evidence that the defendants assumed the liability of guarantors; but whether the evidence introduced was sufficient to remove the legal presumption of guaranty was a question of fact for the trial court, who heard the cause without a jury, which does not arise here, and upon which we express no opinion. Whether the propositions of law held or refused by the court are technically accurate it will not be necessary to determine as the judgment will have to be reversed on other grounds. What has already been said may be regarded as sufficient on another trial to obviate any supposed error in this regard.

As was said in the first part of this opinion, judgment was rendered against one of the defendants by default, and in the trial the court found in favor of the other defendants, and judgment was rendered in their favor against the plaintiffs. The plaintiffs now assign as error the rendition of judgment in their favor against one of the defendants. This error is well assigned. *Thayer* v. *Finley*, 36 Ill. 262.

The action was brought on a joint contract, and the general rule in such cases is that judgment must be rendered against all or none. *Davidson* v. *Bond*, 12 Ill. 84; *Claflin* v. *Dunne*, 129 Ill. 248, 21 N. E. 834.

The judgments of the appellate and circuit courts will be reversed, and the cause remanded to the circuit court.

WEINBERG *vs.* THE REGENTS OF THE UNIVERSITY OF MICHIGAN, Impleaded, Etc. (1893).

97 Mich. 246; 56 N. W. 605.

Error to Washtenaw. (KINNE, J.)

Charles R. Whitman, for appellant.

Bogle & Marquardt, for plaintiff.

MONTGOMERY, J. The plaintiff brought suit against the Regents of the University of Michigan, James B. Angell, James H. Wade and Charles R. Whitman to recover the value of materials furnished to one Lucas, a subcontractor in the building of the University Hospital. The right of action was claimed under Act No. 94, Laws of 1883, as amended by Act No. 45, Laws of 1885 (3 How. Stat.. Sec. 8411a). The declaration avers:

> "That the Regents of the University of Michigan is a public corporation organized and existing under the laws of the State of Michigan, created for the government of the University of Michigan, which said institution belongs to and is the property of the State of Michigan, and is maintained at the expense of this State; that the defendant James B. Angell is President of the Regents of the University of Michigan and the executive head of the University of Michigan; that the defendant James H Wade is the Secretary; that the defendant Charles R. Whitman is a member of the Regents of the University of Michigan; that on or about the months of July and August, A. D. 1890, the Regents of the University of Michigan advertised for proposals for the erection and completion of a hospital building for the University of Michigan, which said hospital building, so to be erected and completed, was to be and has been built at the expense of this State; that afterwards, to-wit, on the first day of October, A. D. 1890, in pursuance to said advertisement and proposals received, the bid of one William Biggs, of the city of Ann Arbor, was accepted and on or about the date aforesaid the Regents of the University of Michigan entered into a contract with said William Biggs for the erection and completion of said hospital, in consideration of the sum of, to-wit, $78,556, which said contract was signed by the defendants James B. Angell, James H. Wade, President and Secretary as aforesaid, and by said William Biggs; that the defendant Charles R. Whitman was a member of the commitee on buildings and grounds appointed by the Regents of the University of Michigan, which building committee was given full authority to act for the said Regents of the University of Michigan until otherwise ordered; that said Charles R. Whitman, as a member of said commitee, was principally in charge of said undertaking of building said hospital; that after-

> wards the said William Biggs, by contract with one John Lucas, sublet a portion of the job for the building and erection of said hospital; that the plaintiff Julius Weinberg is a laborer and material man, engaged in the business of buying, selling and furnishing stone, sand, and other material to contractors and other persons engaged in building, and other business in which such materials are used; that after the contract so made as aforesaid by the Regents to said Biggs, and by Biggs with said John Lucas, said Lucas, subcontractor as aforesaid, applied to the plaintiff to furnish stone for the use in said hospital building, for which said Lucas agreed to pay plaintiff 85 cents for every 16 feet in length by one foot thick and one foot high, as the same was laid in the wall of said building.
>
> "And the plaintiff further says that the defendants, the Regents of the University of Michigan, James B. Angell, James H. Wade and Charles R. Whitman, were the board, officers and agents of the State of Michigan, and made and entered into the contract for the erection of said hospital for and on behalf of the State of Michigan, and had the same built at the expense of this State; that it was the duty of said defendants as aforesaid, under Section 8411a, as amended by Act No. 45, Public Acts of 1885, and Sections 8411b and 8411c, Howell's Annotated Statutes, to require sufficient security by bond for the payment by the contractors and all subcontractors for all labor performed and materials furnished in the erection, repairing, or ornamenting of said hospital building."

The declaration further avers that plaintiff furnished the material in question, relying on such bond, and also avers that he has not received his pay, and concludes:

> "And plaintiff further says that said defendants, in disregard of their duty aforesaid, negligently and carelessly, and in disregard of the rights of the plaintiff, neglected to require of said contractor the bond aforesaid, and permitted the said contractor to enter into said contract for the erection of said hospital building, and to enter upon the performance thereof, without giving security, by bond or otherwise, for the payment by said contractor and all subcontractors for the labor and materials furnished him or any subcontractor, as required by said statute."

To this declaration the defendants demurred, and the plaintiff joined in demurrer, the demurrer was sustained as to the individual defendants, and overruled as to the Regents of the University, and the plaintiff was permitted to amend as to the individual defendants. The defendant the Regents of the University of Michigan brings error. The plaintiff has, however, amended his declaration as against both defendants, and it is requested by both parties that the question of liability be here determined.

It is contended on behalf of the defendant that the statute does not apply to the Regents of the University of Michigan; that the University buildings are not built at the expense of the State, nor are they contracted for on behalf of the State, within the meaning of this statute; that they are constructed by a constitutional corporation, which may sue and be sued, and has power to take and hold real estate for any purpose which is calculated to promote the interests of the University.

The section, as amended by Act No. 45, Laws of 1885, provides:

"That when public buildings or other public works or improvements are about to be built, repaired or ornamented under contract, at the expense of this state, or of any county, city, village, township, or school district thereof, it shall be the duty of the board of officers, or agents, contracting on behalf of the state, county, city, village, township or school district, to require sufficient security by bond for the payment by the contractor and all subcontractors for all labor performed or materials furnished in the erection, repairing or ornamenting of such building, works or improvements."[1]

We think the statute sufficiently broad to cover the contract in question. Act No. 145, Laws of 1889, appropriated—

"For the purchase of a site for, and the erection of, a hospital, for the year 1889, the sum of Twenty-Five Thousand Dollars, and for the year 1890, the sum of Twenty-Five Thousand Dollars: *Provided*, however, That no part of the above-named appropriations for the purchase of a site for and the erection of a hospital shall be paid out of the Treasury until the City of Ann Arbor shall have bound itself to contribute the sum of $25,000 for the same purpose."

Section 2 provides for the assessment of taxes to pay this appropriation. Certainly, then, the undertaking was at the expense of the State and of the City of Ann Arbor, the contribution of the City of Ann Arbor, however, becoming State property upon its appropriation. We think it clear also that the Regents who acted in the matter were agents contracting on behalf of the State. They are officers elected by the voters of the State, whose duties relate to the control of public property. It is altogether too technical to say that the Regents were contracting on behalf of the University; for, while this is in a sense true, it is also true that they, by the very contract in question, provided for the expenditure of State money, and for the construction of a building which it would, I think, be news to most residents of Michigan to learn is not State property. This is as much so as in the case of a school district. *Auditor General* v. *Regents,* 83 Mich. 467.

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[1] The statute (C. L. 1897—10743-10745) quoted in part, consists of three sections, the second and third being as follow:

"(10744) Sec. 2. Such bond shall be executed by such contractor to the people of the State of Michigan, in such amount, and with such sureties, as shall be approved by the board, officers or agents acting on behalf of the state, county, city, village, township or school district as aforesaid, and conditioned for the payment by such contractor or any subcontractor as the same may become due and payable, of all indebtedness which may accrue to any person, firm or corporation on account of any labor performed or materials furnished in the erection, repairing or ornamenting of such buildings or works. Such bond shall be deposited with and held by such board, officer or agent, for the use of any party interested therein."

"(10745) Sec. 3. Such bond may be prosecuted, and recovery had, by any person, firm or corporation to whom any money shall be due and payable on account of having performed any labor, or furnished any materials, in the erection, repairing or ornamenting of such building or works, in the name of the people of this state, for the use and benefit of such person, firm or corporation: Provided, That the people of this state shall, in no case brought under the provisions of this act, be liable for costs."

It is contended by the defendant that the liability for neglect to require this bond attaches to the individuals who represented the State, county, city, village, township or school district in the letting of the contract, and not to the State or county or corporation of which they are directly the officers or agents. We think the defendant is right in this contention. In *Owen* v. *Hill*, 67 Mich. 43, and *Plummer* v. *Kennedy*, 72 id. 295, the action was brought against the individuals composing the board. In *Wells* v. *Board of Education*, 78 Mich. 260, it was held that the officers were personally liable for materials on failure to take the required bond. Our attention has not been called to any case in which the municipality, in the case of a township or school district, or a public or *quasi*-public corporation, has been held liable as such, and it seems to us that there are insuperable objections to so holding. The duty rests upon the officers of the State, as well as cities, counties and school districts. Can it be intended that the State, which must act through its public officers, is to be held liable as for a tort for a mere neglect to take the bond required by this statute? It is true that it is urged that the Board of Regents is an agent of the State. This may be true in a certain sense, but we think the board, as a board, is not the agent contemplated by this statute, but that the officers who act directly are the ones who, as individuals, fall within the purview of the Act. It may be doubtful to what extent the board of managers of a hospital, which is a public institution, like the one in question, can be made liable for negligence; as to which see *McDonald* v. *Hospital*, 120 Mass. 432; *Glavin* v. *Hospital,* 12 R. I. 411. We do not deem it necessary to decide whether, under such circumstances as are involved in those two cases, the board of managers of the hospital, as a corporation, may not be liable. In such a case it might well be contended that it has undertaken to perform certain duties, and established relations toward the patients which impose upon the body in control certain duties. But the ground of the plaintiff's right to recover at all in this case is that this property is State property, and further that the building is being constructed at the expense of the State, and that the members of the board were acting for and on behalf of the State in making the contract. It could not be contemplated that the State or the public corporation is to be made liable. The individual guilty of the wrong or neglect of duty is the one against whom the action should be directed. Cooley, Torts, 621. The wrong is in the nature of a tort consisting of neglect of duty owing to the public generally, for which the public corporation as such is not liable, unless made so by statute.

It follows from the views expressed that the judgment should be reversed, and the case remanded, that the plaintiff may proceed against the individuals named in the amended declaration.

McGrath, J., concurred with Montgomery, J.

Grant, J. I concur in the opinion of my brother Montgomery that under Act No. 94, Laws of 1883, as amended by Act No. 45, Laws of 1885, the public corporation cannot be made liable, but only those officers or agents of such corporation to whom is committed the duty of letting contracts for the erection of public buildings or making public improvements. But I cannot concur in holding that the statute applies to the corporation known as "The Regents of the University of Michigan." The grounds, buildings and other property of all the other State institutions, penal, reformatory, charitable and educational, belong to the State. These institutions are the creations of the Legislature. They are under the exclusive control and management of the State. The State which created them, may at any time repeal the laws by which they were established and sell the property. The public buildings, public works and public improvements mentioned in the statute, mean those over which the State has control. This is evident from the language of the statute, which says:

> "It shall be the duty of the board of officers, or agents, contracting on behalf of the State, * * * * * to require sufficient security by bond," etc.

The Regents make no contracts on behalf of the State, but solely on behalf of and for the benefit of the University. All the other public corporations mentioned in the Constitution, which have occasion to erect public buildings or to make public improvements, are expressly included in this statute. *Expressio unius est exclusio alterius.* It expressly enumerates the state, counties, cities, villages, townships and school districts. If the University were under the control and management of the legislature, it would undoubtedly come within this statute, as do the Agricultural College, Normal School, State Public School, asylums, prisons, reform schools, houses of correction, etc. But the general supervision of the University is, by the Constitution, vested in the Regents. Const. Art. 13, §§ 7, 8.

> "Sec. 7. The Regents of the University, and their successors in office, shall continue to constitute the body corporate known by the name and title of 'The Regents of the University of Michigan.'
>
> "Sec. 8. The Regents of the University shall, at their first annual meeting, or as soon thereafter as may be, elect a President of the University, who shall be ex-officio a member of their Board, with the privilege of speaking, but not of voting. He shall preside at the meetings of the Regents, and be the principal executive officer of the University. The Board of Regents shall have the general supervision of the University, and the direction and control of all expenditures from the University interest fund."

Section 2, Art. 13, is as follows:

> "The proceeds from the sales of all lands that have been or hereafter may be granted by the United States to the State for educational purposes, and the proceeds of all lands or other property given by individuals or appropriated by the State for like purposes, shall be and remain a perpetual fund, the interest and income of which, together with the rents of all such lands as may remain unsold, shall be inviolably appropriated and annually applied to the specific objects of the original gift, grant, or appropriation."

Under the Constitution, the State cannot control the action of the Regents. It cannot add to or take away from its property without the consent of the Regents. In making appropriations for its support, the Legislature may attach any conditions it may deem expedient and wise, and the Regents cannot receive the appropriation without complying with the conditions. This has been done in several instances.

Property aggregating in value nearly or quite half a million of dollars has been donated to the University by private individuals. Such property is the property of the University. It is not under the control of the State when it acts through its executive or legislative departments, but of the Regents, who are directly responsible to the people for the execution of their trust. So, when the State appropriates money to the University it passes to the Regents and becomes the property of the University, to be expended under the exclusive direction of the Regents, and passes beyond the control of the State through its legislative department.

The University and the school district are both provided for in the same article of the Constitution. Why should the Legislature mention the school district in this statute and leave out the University, if it was its intention to include the latter? The University is the property of the people of the State, and in this sense is State property, so as to be exempt from taxation. *Auditor-General* v. *Regents,* 83 Mich. 467. But the people, who are the corporators of this institution of learning, have, by their Constitution, conferred the entire control and management of its affairs and property upon the corporation designated as "The Regents of the University of Michigan," and have thereby excluded all departments of the State government from any interference therewith. The fact that it is State property does not bring the Regents within the purview of the statute. The people may, by their constitution, place any of its institutions or property beyond the control of the Legislature.

This Court has refused to compel the Regents to comply with certain provisions of acts of the Legislature against their judgment that they were not for the best interests of the University. *People* v. *Regents,* 4 Mich. 104; *People* v. *Regents,* 18 id. 469; *People* v. *Regents,* 30 id. 473. The Legislature was undoubtedly cognizant of the above decisions, for the questions involved were of considerable public interest.

These considerations lead me to the conclusion that the Regents are not included in this act, and that the judgment should be reversed, and judgment entered in this Court for the defendants.

Judgment entered accordingly.

HOOKER, C. J., and LONG, J., concurred with GRANT, J.

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United States, to use of Anniston Pipe & Foundry Co., *vs.* National Surety Co. (1899).

92 Fed. 549 (Eighth, C. C. A.)

In error to the Circuit Court of the United States for the Eastern District of Missouri.

This suit was brought by the Anniston Pipe & Foundry Company, the plaintiff in error, in the name of the United States, against the National Surety Company, the defendant in error, on a bond executed by the defendant on July 15, 1895, as surety for T. J. Prosser, the bond having been executed pursuant to the provisions of an act of congress approved August 13, 1894 (28 Stat. 278, c. 280), which is as follows:

> "*An Act for the protection of persons furnishing materials and labor for the construction of public works.*
>
> "Be it enacted," etc., "that hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the department under the direction of which said work is being, or has been prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution: provided, that such action and its prosecution shall involve the United States in no expense."

T. J. Prosser, the principal in the bond, had entered into a contract with Charles B. Thompson, assistant quartermaster of the United States army, who acted for and in behalf of the United States of America, for the construction of a boiler and pump house, pumping machinery, and connections, water mains, steel trestle, and water tank, etc., for the water-supply system for the new military post near Little Rock, Ark.; and the bond contained a condition, in substance, that if said Prosser, his heirs, executors, and administrators, should in all respects duly and fully observe and perform all and singular the covenants, conditions, and agreements in and by said contract agreed to be observed and performed by said Prosser, according to the true intent and meaning of said contract, as well during any period of extension of said contract as during the original term, and should make full payments to all persons supplying him labor or materials in the prosecution of the work provided for in said contract, then the obligation should become void, but otherwise remain in full force and virtue. The plaintiff company sued to recover of the defendant, as surety in said bond, the sum of $842.98, with interest and costs, being the value of certain water pipe which it had supplied to Prosser, subsequent to the execution of the aforesaid bond and contract, to enable him to execute the agreement with the government, and which pipe so supplied he had actually used for that purpose, but had not paid for. For a defense to the action the defendant pleaded, and the trial court so found, that subsequent to the execution of the aforesaid bond, and the contract which it was given to secure, the government had entered into a further agreement with Prosser, modifying the terms of the original contract, or, more accurately, the specifications thereto attached, in such a manner that Prosser was required to lay only 1,866 linear feet of six-inch water pipe in place of 3,850 feet, as specified in the original contract, and that this change in the terms of the original contract, or rather the plans for its execution, was made without the knowledge or consent of the surety company. In view of the change in the plans for the execution of the contract which lessened the amount of water pipe necessary to be supplied and used, the trial court ruled that the plaintiff could not recover. It accordingly rendered a judgment in favor of the defendant, to reverse which the record has been removed to this court by a writ of error.

Truman A. Post, for plaintiff in error.

J. E. McKeighan (*Shepard Barclay*, *M. F. Watts*, and *G. A. Vandeveer*, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, C. J., after stating the case as above, delivered the opinion of the court.

It is a familiar rule of law that the contract of a surety must be strictly construed, and that it cannot be enlarged by construction, and that when a bond, with sureties, has been given to secure the performance of a contract, and the principal in the bond and the person for whose benefit it was given make a material change in the contract without the consent of the surety, the latter is thereby discharged. For present purposes, it may be conceded that the finding of the lower court in the case at bar discloses such a modification of the original contract between Prosser and the United States as would fall within the rule last stated, and release the defendant company from its liability, if the United States was suing for its own benefit for a breach of some provision of the contract, the due performance of which the bond was intended to secure. Such, however, is not the case. The suit is not brought by the United States to recover any damage which it has sustained; neither is it brought to enforce any provision of the contract which was entered into between the United States and the principal in the bond. On the contrary, the action is one to enforce a stipulation found in the bond, and only in the bond, which was intended solely for the protection of laborers and material men who might furnish labor and materials while the contract was being executed by Prosser. The United States is merely a nominal plaintiff, and as such, under the provisions of the act of congress, it cannot be held liable even for costs. The real plaintiff is the corporation for whose use the suit was brought, and it sues to enforce an obligation which congress required to be inserted in the bond for its protection and for the protection of others who might furnish labor or materials while the work was in progress.

The real question to be considered, therefore, is whether the act of congress under which the bond in suit was taken constituted the United States the agent or representative of the persons who supplied labor and materials after the contract and bond were executed, in such a sense that its action in consenting to a modification of the contract with Prosser must be imputed to the laborers and material men, and held to deprive them, as well as the government, of all recourse against the surety.

The act of congress of August 13, 1894, does not authorize the United States to bring suits of its own motion against the obligors in such bonds as are therein provided for, to recover what is due to laborers and material men. It is not empowered to act in their behalf in that respect, but such actions can only be brought at the instance of persons who furnish labor and materials, who are authorized, without previous leave being obtained from any executive department, to sue in the name of the United States, and control the litigation precisely as they might control it if the suits were brought in their own name. It is also noticeable that in its title the act professes to be one for the benefit "of persons furnishing materials and labor," and that in the body of the act the form of the condition to be inserted in the bond for the benefit of the United States is not in terms prescribed, the only provision in that regard being that the bond shall be "the usual penal bond"; meaning, evidently, such an obligation for the government's own protection as it had long been in the habit of exacting from those with whom contracts were made for the doing of public work. On the other hand, the condition for the benefit of persons who might furnish materials or labor is carefully prescribed. Obviously, therefore, congress intended to afford full protection to all persons who supplied materials or labor in the construction of public buildings or other public works, inasmuch as such persons could claim no lien thereon, whatever the local law might be, for the labor and materials so supplied. There was no occasion for legislation on the subject to which the act relates, except for the protection of those who might furnish materials or labor to persons having contracts with the government. The bond which is provided for by the act was intended to perform a double function,—in the first place, to secure to the government, as before, the faithful performance of all obligations which a contractor might assume towards it; and, in the second place, to protect third persons from whom the contractor obtained materials or labor. Viewed in its latter aspect, the bond, by virtue of the operation of the statute, contains an agreement between the obligors therein and such third parties that they shall be paid for whatever labor or materials they may supply to enable the principal in the bond to execute his contract with the United States. The two agreements which the bond contains, the one for the benefit of the government, and the one for the benefit of third persons, are as distinct as if they were contained in separate instruments, the government's name being used as obligee in the latter agreement merely as a matter of convenience.

In view of these considerations, we are of opinion that the sureties in a bond, executed under the act now in question, cannot claim exemption from liability to persons who have supplied labor or materials to their principal to enable him to execute his contract with the United States, simply because the government and the contractor, without the surety's knowledge, have made some changes in the contract, subsequent to the execution of the bond given to secure its performance, which do not alter the general character of the work contemplated by the contract or the general character of the materials which are necessary for its execution. When the government has executed the contract and taken and approved the bond, it ceases to be the agent of third parties whom the contractor employs in the execution of the work or from whom he obtains materials, and the rights of such persons under the bond are unaffected by subsequent transactions between the government and the contractor. If such were not the case, it would be possible for the contractor and some officer of the United States, by making some change in the contract or specifications, to deprive laborers and material men of all recourse against the sureties in the bond after they had supplied materials and labor of great value in reliance upon its provisions. It is not probable that such a result was contemplated by the lawmaker. On the contrary, the act bears every evidence that it was intended to provide a security for laborers and material men on which they could rely confidently for protection, unless they saw fit, by their own dealings with the contractor, to relinquish the benefit of the security. We are confirmed in these views by the following authorities: *Dewey* v. *State* 91 Ind. 173; *Conn.* v. *State*, 125 Ind. 514, 25 N. E. 443; *Doll* v. *Crume*, 41 Neb. 655, 59 N. W. 806; *Kaufmann* v. *Cooper*, 46 Neb. 644, 65 N. W. 796; *Steffes* v. *Lemke*, 40 Minn. 27, 41 N. W. 302. The first two of these cases are very much in point. Bonds were given to the state of Indiana as obligee for the doing of public work, in pursuance of a statute of that state, which bonds contained conditions requiring—First, the faithful performance and execution of the work undertaken by the contractor; and, second, the prompt payment by the contractor of all debts incurred by him in the prosecution of the work for labor and materials supplied by third parties. It was held, in substance, that for any breach of the second condition of the bond by the contractor the right of action was in the laborer or the material man, and that such right of action could not be defeated or prejudiced by any act done by the obligee in the bond after the bond had been taken and approved. It was accordingly ruled that changes made in the contract by the parties thereto, to wit, the contractor and the public authorities, after the bonds had been executed and accepted, would not deprive material men of their right to recover against the sureties in the bond. It results from what has been said that the judgment of the circuit court was erroneous upon the facts found by that court, and should be reversed. It is so ordered, and that the case be remanded for a new trial.

GRIFFITH *et al.* *vs.* RUNDLE *et al.* (1900).

23 Wash. 453 ; 55 L. R. A. 381 ; 63 P. 199.

APPEAL by defendants from a judgment of the Superior Court for Spokane county in favor of plaintiffs in an action brought to hold sureties on a contractor's bond liable for unpaid labor and materials which went into the construction of the building. Affirmed.

The facts are stated in the opinion.

Messrs. *Henley, Kellam, & Lindsley* and *A. G. Avery*, for appellants.

Messrs. *Lewis & Lewis,* for respondents.

REAVIS, J., delivered the opinion of the court:

In July, 1897, defendant Rundle entered into a contract with the United States for the construction of certain buildings at the army post near Spokane. At the time the contract was executed, a bond was duly executed in accordance with the provisions of the act of Congress approved August 13, 1894 (28 Stat. at L. p. 278, chap. 280). The law is entitled "An Act for the Protection of Persons Furnishing Materials and Labor for the Construction of Public Works." Its provisions are substantially that any person entering into a formal contract with the United States for the construction of any public building shall be required, before commencing, to execute the usual penal bond with good and sufficient sureties, with the additional obligations that the contractor shall promptly make payments to all persons supplying him labor and materials in the prosecution of the work provided for in the contract; that any persons performing labor or furnishing materials for such work shall be furnished on application with a certified copy of the contract and bond upon which the person supplying labor and materials shall have a right of action, and be authorized to bring suit in the name of the United States against the contractor and sureties, provided that such action shall involve the United States in no expense. The defendants Henley and Snodgrass were sureties upon the bond, the penal sum of which was $10,000. While the contractor, Rundle, was engaged in the construction of the buildings under his contract, materials were furnished by plaintiffs to the contractor, and used by him in the work of construction. Subsequently, and while the buildings were but partially completed, the United States, in the exercise of the right reserved in the contract, took the work out of the hands of Rundle, and at the same time notified the sureties, Henley and Snodgrass, of its action. Thereupon the sureties took up the work of construction, and completed the buildings according to Rundle's contract, and the United States accepted their work as full performance of the contract. For defense to the action, after some denials, the sureties set up the fact that Rundle did not complete the contract, but the sureties, under its terms, made full performance, which was duly accepted by the United States, and that in their completion of the contract they were necessarily compelled to expend sums in excess of $10,000, the amount of the penalty in the bond.

1. The several assignments of error made by the appellants may be grouped together, and stated as the refusal of the superior court to admit testimony under the affirmative defense set forth in the answer. The court excluded any evidence with reference to the United States having demanded of the sureties the performance of the contract or the payment of damages. It is maintained by counsel for appellants that the limit of the liability of the sureties was the penalty stated in the bond, $10,000; that, if the sureties had not undertaken the performance of the contract of their principal, the entire damages to both the government and the respondents and all of the other claimants for labor and materials would have been liquidated by the payment of $10,000; that the fact that the sureties necessarily expended more than that sum in the completion of the contract, and over the contract price, relieves them from further liability. It is also maintained that, if the contract had not been completed, the government is a preferred creditor, and its claim would exhaust the penalty, and there

would be no funds left for the satisfaction of plaintiffs and other claimants of like character; and counsel maintain that it is necessary to determine the question of priority of rights as between the government and these claimants. In a case involving these facts,—*United States use of Fidelity Nat. Bank* v. *Rundle,*—in the United States circuit court, judgment was entered in conformity with the contention of counsel here. But the cause was afterwards reversed by the United States circuit court of appeals (40 C. C. A. 450, 100 Fed. 400), and the appellate court observed: "The undisputed facts of the present case are such that it is not necessary to consider the question presented in the court below, and argued here, whether if the United States had any cause of action upon the bond in suit, its claim should be preferred to that of the laborers and material men; for, as has already been observed, the United States received full performance of the contract, and therefore has no cause of complaint." In the case of *United States use of Anniston Pipe & Foundry Co.* v. *National Surety Co.,* 34 C. C. A. 526, 92 Fed. 549, such a bond was under consideration by the court, and it was there adjudged that the bond was intended to perform a double function: First, to secure the faithful performance of the contract to the government; and, second, to protect third persons from whom the contractor might obtain labor or materials in the prosecution of the work. In its second aspect, the bond, by virtue of the statute, contains a separate and distinct agreement between the obligors and such third persons as to which the agency of the government ceases when the bond is given and approved, and subsequent changes in the contract, agreed upon between the government and the contractor, though without the knowledge or consent of the surety, will not release the surety from liability to persons who supply labor or materials thereunder. The court observed of the statute under which the bond is executed: "It is also noticeable that in its title the act professes to be one for the benefit 'of persons furnishing materials and labor,' and that in the body of the act the form of the condition to be inserted in the bond for the benefit of the United States is not in terms prescribed, the only provision in that regard being that the bond shall be 'the usual penal bond;' meaning, evidently, such an obligation for the government's own protection as it had long been in the habit of exacting from those with whom contracts were made for the doing of public work. On the other hand, the condition for the benefit of persons who might furnish materials or labor is carefully prescribed. Obviously, therefore, Congress intended to afford full protection to all persons who supplied materials of labor in the construction of public buildings or other public works, inasmuch as such persons could claim no lien thereon, whatever the local law might be, for the labor and materials so supplied. There was no occasion for legislation on the subject to which the act relates, except for the protection of those who might furnish materials or labor to persons having contracts with the government. * * * Viewed in its latter aspect, the bond, by virtue of the operation of the statute, contains an agreement between the obligors therein and such third parties that they shall be paid for whatever labor or materials they may supply to enable the principal in the bond to execute his contract with the United States. The two agreements which the bond contains—the one for the benefit of the government, and the one for the benefit of third persons—are as distinct as if they were contained in separate instruments, the government's name being used as obligee in the latter agreement merely as a matter of convenience." In the case of *Dewey* v. *State ex rel. McCollum*, 91 Ind. 173, it was substantially held that for any breach of the second condition of such a bond by the contractor the right of action was in the laborer or the material man, and that such right of action could not be defeated or abridged by any act done by the obligee in the bond after the bond had been taken and approved; and it was ruled that changes made in the contract by the parties thereto—that is, the contractor and the public authorities—after the bonds had been accepted would not deprive material men of their rights to recover against sureties in the bond. To the same effect is *Conn* v. *State ex rel. Stutsman*, 125 Ind. 514, 25 N. E. 443, and the same principle is affirmed in *Doll* v. *Crume*, 41 Neb. 655, 59 N. W. 806; *Kaufmann* v. *Cooper*, 46 Neb. 644, 65 N. W. 796; *Steffes* v. *Lemke*, 40 Minn. 27, 41 N. W. 302. The practical effect of the statute, and others of similar character in a number of the states, seems to be to confer a special lien in favor of such persons who furnish labor and material, and to substitute the bond in place of the public building as a thing upon which the lien is to be charged. Such liens evidently appear, from an inspection of the current legislation, to be favored, and the courts have usually adopted a liberal rule of construction in their enforcement.

2. It is pertinent to suggest that in the performance of the unfinished contract by the sureties, if they had expended less than the amount to be paid by the government on the completion of the contract, the excess or profit would have belonged to them, and, if they undertook the completion of the contract and sustained a loss, it would seem that it should fall upon them. As sureties under the terms of the contract, they might elect to complete it upon default of their principal, but such completion was not the full performance of the contract by the principal himself. It satisfied the sureties' contract with the government, but, as observed by the circuit court of appeals in *United States use of Fidelity Nat. Bank* v. *Rundle*, 40 C. C. A. 450, 100 Fed. 400, the United States is not a claimant here, and the question of priority of claims to the amount due from the sureties under the terms of the bond is not involved in this case.

The judgment of the Superior Court must be affirmed.

DUNBAR, Ch. J., and FULLERTON and ANDERS, JJ., concur.

UNION BANK OF LOUISIANA *vs.* COSTER'S EXECUTORS (1850).

3 N. Y. 203.

On the 29th of May, 1841, Heckscher & Coster, merchants of the city of New York, executed and sent to Kohn, Daron & Co., merchants in New Orleans, a letter of credit as follows:

> "NEW YORK, 29 May, 1841.
>
> "SIR: We hereby agree to accept and pay at maturity any draft or drafts on us at sixty days' sight, issued by Messrs. Kohn, Daron & Co. of your city, to the extent of twenty-five thousand dollars, and negotiated through your bank. We are respectfully, sir, your obd't serv'ts,
>
> "HECKSCHER & COSTER."

At the foot of the letter of credit was a guaranty executed at the same time by John G. Coster, as follows:

> "I hereby guarantee the due acceptance and payment of any draft issued in pursuance of the above credit.
>
> "JOHN G. COSTER."

On the faith of the above letter of credit and guaranty, the Union Bank of Louisiana, in January, 1842, purchased two drafts drawn by Kohn, Daron & Co. on Heckscher & Coster, amounting to about $9,000, which were accepted and paid by the latter according to their agreement. On the 14th of February, 1842, the bank, under the same letter of credit, purchased another draft for $4,000, at sixty days' sight, drawn by and upon the same parties; and on the 26th of that month this draft was presented to Heckscher & Coster, in New York, for acceptance, which they refused. On the 9th of April, 1842, the attorney for the Union Bank gave notice to John G. Coster that he had received the draft for collection, and on the 2d of May, 1842, formal notice of the protest of the draft for non-payment was served on Mr. Coster. In August, 1844, John G. Coster died, and the Union Bank subsequently brought this suit in the superior court of the city of New York, against his executors, upon the guaranty above set forth, for the purpose of recovering the amount of the draft. On the trial, in addition to the facts already stated, it appeared that prior to any of the above mentioned transactions with the Union Bank, the said letter of credit and guaranty had been held by the City Bank of New Orleans, which, upon the faith thereof, in December, 1841, had purchased a draft of $10,000 drawn by Kohn, Daron & Co. upon Heckscher & Coster. The letter and guaranty were not addressed to any particular person or bank.

Wm. M. Evarts, for appellants.

B. W. Bonney, for respondents.

PRATT, J., delivered the opinion of the court. Contracts of guaranty differ from other ordinary simple contracts only in the nature of the evidence required to establish their validity. The statute requires every special promise to answer for the debt, default or miscarriage of another, to be in writing subscribed by the party to be charged thereby, and expressing therein the consideration; and no parol evidence will be allowed as a substitute for these requirements of the statute. But in other respects the same rules of construction and evidence apply to contracts of this character which apply to other ordinary contracts. Hence the consideration which will support a contract of this character, as in other cases, may consist in some benefit to the promisor, or some other person at his request, or some trouble or detriment to the promisee. (20 Wend. 184, 201; Theobald on Pr. & Surety, 3, 4; 2 H. Bl. 312.) Nor is any particular form of words necessary to be used for expressing the consideration; but it is enough if from the whole instrument the consideration expressly or by necessary inference appears; so that it be clear that such and no other was the consideration upon which the promise was made. (24 Wend. 35; 21 id. 628; 4 Hill, 200; 8 Ad. & El. 846; 5 Barn. & Ad. 1109.) And the rule allowing two or more instruments given at the same time and relating to the same subject matter to be construed together as one instrument, applies also to this class of contracts; so that when a guaranty is given at the same time with the principal contract and forms a part of the entire transaction, if the consideration be stated in the principal contract, though none be stated in the guaranty, it will suffice. 8 John. 35; 9 Wend. 218; 18 id. 114. So also as in other cases, parol evidence of the circumstances under which the contract was made may be given, to aid the court in giving a true construction to ambiguous terms therein, or to show that separate contracts relate to the same subject matter.

It should also be observed here, that our statute in terms only requires the contract to express therein what it had been well settled the statute of Elizabeth required it to contain, and the same rules of construction should therefore be applied in cases under both statutes. 24 Wend. 35.

With these observations in relation to the law governing cases of this kind, we come to the consideration of the contract in question.

The letter of credit of Heckscher & Coster is an original undertaking on the face of it to accept any drafts to be drawn upon them at sixty days by Kohn, Daron & Co. to the extent of $25,000, and negotiated by the bank to whom it is addressed. The consideration of their undertaking appears very plainly from the instrument. It is an open proposition to the bank to which it is addressed, that if it will purchase the drafts drawn by Kohn, Daron & Co. they will accept and pay the same. As soon therefore as the bank complied with the proposition the contract was closed, and the rights and liabilities of the parties became fixed. Upon this part of the contract there can be no question that a sufficient consideration appears upon the face of the contract to uphold it. But it requires no greater or different consideration to support a guaranty than to support an original promise. The only difference in the two cases consists in the former requiring the consideration to appear upon the contract itself, whereas the consideration to support the latter may be proved by parol. The question therefore in this case is whether the consideration of the undertaking of the defendants' testator appears upon the instrument itself, or rather whether the two instruments may be read together so that the same consideration shall support both.

The guaranty is without date and at the foot of the letter of credit. Independent of the parol testimony it should be deemed to have been made at the same time. It is addressed to the same person and relates to the same subject matter. It should therefore, within every rule of construction, be deemed part of the same transaction, and the two instruments should be read together as one contract. The two would read thus: "In consideration that you, the Union Bank of Louisiana, will purchase any draft or drafts to be issued by Kohn, Daron & Co. upon Heckscher & Coster, at sixty days, not exceeding $25,000, we the said Heckscher & Coster will accept and pay the same; and I the said John G. Coster agree that Heckscher & Coster shall accept and pay the same." Now it seems to me clear that such is the fair reading of the two contracts taken together; and although the contract of John G. Coster may be deemed collateral, yet had the two been drawn in the above form no question could have been raised upon the statute of frauds. But what may be fairly inferred from the terms of a contract should be considered, for the purpose of giving it effect, as contained in it; and this rule applies as well to collateral as to original undertakings. 5 Hill, 147.

There is a wide difference between the guaranty of an existing debt and the guaranty of a debt to be contracted upon the credit of the guaranty. It is the difference between a past and future consideration. A past consideration, unless done at the request of the promisor, is not sufficient to support any promise. But a promise to do an act in consideration of some act to be done by the promisee implies a request, and a compliance on the part of the latter closes the contract and makes it binding. And although it may be necessary from the nature of the case to prove performance by parol, yet such evidence is no violation of the statute requiring the consideration to be in writing. The consideration of the promise is expressed, and the parol evidence is only used to show, not what the consideration is, but that the act which constitutes that consideration has been performed. Any other rule would require every person to whom a letter of credit is directed to accept the same in writing before the drawer would be bound. For instance, a letter drawn in the country and addressed to a merchant in the city, guaranteeing the responsibility of the person for whose benefit the same was drawn for a given bill of goods to be sold to him, would require a written acceptance by the city merchant before it would be binding upon the drawer. No such strict rule can be found supported by any adjudication. I am therefore satisfied that the consideration of the guaranty in the case at bar sufficiently appears in the contract, and that the same was valid and binding upon the defendants' testator. I have not been able to find a case in our own or the English courts which would conflict with the doctrine above advanced; but on the contrary, the books are full of cases similar in their circumstances to this case, where the guaranty has been sustained. 8 John. 35; 11 id. 221; 10 Wend. 218; S. C. in error, 13 id. 114; 12 id. 218; 24 id. 35; 4 Hill, 200; 4 Denio, 559; 1 Ad. & E. 57; 5 Bligh's N. R. 1; 7 Mees. & Wels. 410; 9 East, 348; 1 Camp. 242; 3 Brod. & Bing. 211; 4 C. & P. N. P. 59; 8 Dowl. & Ryl. 62.

The next question raised in the case is as to notice of acceptance. We must hold the law to be settled in this state that where the guaranty is absolute no notice of acceptance is necessary. Judge Cowen in *Douglass* v. *Howland* (24 Wend. 35), and Judge Bronson, in *Smith* v. *Dann* (6 Hill, 543), examined the cases at length upon this question, and they showed conclusively that by the common law no notice of the acceptance of any contract was necessary to make it binding, unless it be made a condition of the contract itself, and that contracts of guaranty do not differ in that respect from other contracts. In this case the only condition of Coster's undertaking was that the bank should purchase the drafts to be issued by Kohn, Daron & Co., and upon complying with that condition the rights of the parties became fixed, and the contract binding. There is nothing in the contract from which we can infer that it was the intention of the parties that notice should be given in order to fix the guarantor. No more is required to make the guarantor liable than to make Heckscher & Coster, and the only notice to them necessary was the presentment of the drafts for their acceptance within a reasonable time. *Allen* v. *Rightmere*, 20 John. 365; *Clark* v. *Burdett*, 2 Hall, 197; Cro. Jac. 287, 685; 2 Salk. 457; Vin. Ab. Notice, A. 3; Com. Dig. Plead. C. 75; 2 Chitty, 403.

As to notice of non-acceptance and non-payment of the bills by the drawees, that can only involve the subject of laches on the part of the holders of the drafts, and all the cases, both in England and in this country, concur in holding that this defense can only be set up to an action against the surety in cases where he has suffered damage thereby, and then only to the extent of such damage. 7 Peters, 117; 12 id. 497; 1 Mason, 323, 368; 1 Story, 22; 13 Conn. 28; 5 Man. & Gran. 559; 13 Mees. & Wels. 452; 3 Kent's Com. 122. If, therefore, it were necessary in this case to give any notice, no evidence has been given showing that the defendants, or the guarantor, suffered any loss in consequence of the want of such notice.

The only remaining question, therefore, worthy of consideration in this case, arises out of the fact that another bank had previously purchased drafts drawn in pursuance of the letter of credit and guaranty. It is claimed that by such purchase the contract became a fixed and binding contract between such bank and the promisor, and thereby lost its negotiable character, and became located so that no other person or bank could purchase drafts upon the credit of it.

The guaranty, in this case, was manifestly intended to accompany the letter of credit, and is subject, in this respect, to the same construction. If, therefore, it was competent for Kohn, Daron & Co. to draw several drafts not exceeding the limit in the bill of credit specified, and to negotiate them at different banks, and Heckscher & Coster would be bound by their letter of credit to accept and pay them, the guarantor would also be liable to the same extent. As a general rule the surety is liable to the same extent as the principal, unless he expressly limits his liability. (Theobold on Prin. and Surety, 46.) It therefore only becomes necessary to examine the letter of credit, and ascertain whether it was intended to be limited to one particular bank, or is a general letter of credit to any and all persons who may advance money upon it. It is somewhat singular that we find so few adjudications in our courts upon a class of commercial instruments which enter so largely into the commerce and business of this country, and of the world.

In England it seems to be at this time questionable whether a party who advances money upon a general letter of credit can sustain an action upon it. *Russell et al.* v. *Wiggins*, 2 Story, 214; *Bank of Ireland* v. *Archer*, 2 Mees. & Welsby, 383. The reason assigned is that there is no privity of contract between them. It is there assumed that it is only a contract between the drawer of the letter and the person for whose benefit it is drawn.

But in this country the contrary doctrine is well settled. Letters of credit are of two kinds, general and special. A special letter of credit is addressed to a particular individual by name, and is confined to him, and gives no other person a right to act upon it. A general letter, on the contrary, is addressed to any and every person, and therefore gives any person to whom it may be shown authority to advance upon its credit. A privity of contract springs up between him and the drawer of the letter, and it becomes in legal effect the same as if addressed to him by name. *Russell* v. *Wiggins*, 2 Story's Rep. 214; 12 Mass. 154; 2 Metcalf, 381; 12 Wend. 393; 12 Peters, 207; *Burkhead* v. *Brown*, 5 Hill, 641; Story on Bills; See Beames' Lex. Mer. 444.

But these general letters of credit may be subdivided into two kinds, those that contemplate a single transaction, and those that contemplate an open and continued credit, embracing several transactions. In the latter case they are not generally confined to transactions with a single individual, but if the nature of the business which the letter of credit was intended to facilitate, requires it, different individuals are authorized to make advances upon it, and it then becomes a several contract with each individual to the amount advanced by him. Thus a general letter of credit may be issued to a person to enable him to purchase goods in the city of New York, for a country store. The very nature of the business requires him to deal with different individuals and houses in order to obtain the necessary assortment. It has never, as I am aware, been questioned that the guarantor might be bound to several persons who should furnish goods upon the credit of the letter.

So letters are issued by commission houses in the city, to enable persons to purchase produce in the western states. The money is obtained from the local banks in those states by drafts drawn upon those houses, and upon the faith of the letters of credit. It may often happen that a single bank can not furnish the requisite amount, or it may be necessary to use money in different and distant localities. I am not aware of any question ever having been raised as to the authority of different banks to act upon the same letter of credit. It is absolutely necessary that such should be the effect of them in order to facilitate the commerce of the country, and to carry out the object of the parties in issuing the letters of credit. *Burkhead* v. *Brown*, 5 Hill, 641; 2 Story's Rep. 214.

The letter of credit in this case was evidently intended to be general; it did not contemplate a single transaction, or draft for the whole amount, but several drafts limited in the aggregate to twenty-five thousand dollars. Although the address "sir," and "your bank," is in the singular number, yet I think it was intended to be used in a distributive sense, and apply to any bank or banks who should purchase the drafts. I can see no object which the drawers should have for limiting the party for whose benefit the letter was issued to a single bank. It is said that it would enable them more readily to revoke the authority. But these letters are not issued without either undoubted confidence in the persons for whose benefit they are drawn, or upon ample security. The idea of giving notice of revocation to any party but that for whose benefit they are drawn, is never entertained by the guarantors in cases of general letters. When they wish to provide for any such contingency the letters are framed accordingly. Again, in this case the parties themselves have treated this letter as not limited to a single bank, for they accepted bills which had been discounted by the plaintiffs.

I am, therefore, satisfied that the plaintiffs were authorized to purchase bills upon the faith of the letter and accompanying guaranty, and that the previous purchase of bills by another bank is no defense.

Whether the letters had been revoked with the knowledge of the plaintiffs before the draft was discounted by them, was a question of fact for the jury. It would clearly constitute no defense unless the plaintiffs had notice of it. The judgment of the superior court must therefore be affirmed with costs.

Judgment affirmed.

THE EVANSVILLE NATIONAL BANK OF EVANSVILLE, INDIANA, Respondent, *vs.* ADOLPH KAUFMANN *et al.*, Appellants (1883).

93 N. Y. 273.

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made May 25, 1881, which reversed a judgment in favor of defendants, entered upon a report of a referee. Reported below, 24 Hun. 612.

This action was brought to recover the amount of two drafts drawn by Bingham Bros., of Evansville, Ind., on A. Feigelstock, of the city of New York, which were discounted by plaintiff at Evansville, and forwarded to New York for acceptance and payment by the drawee, by whom they were dishonored.

Defendants were sought to be made liable under the following letter of credit, which was delivered, to and left with defendants, and upon the security of which they discounted the paper:

"New York, December 29, 1874.

"Messrs. Bingham Bros., Evansville, Ind.:

"Dear Sirs—Any drafts that you may draw on Mr. A. Feigelstock, of our city, we guarantee to be paid at maturity.

"Truly yours,

"Kaufmann & Blun."

The further facts appear in the opinion.

Charles Edward Souther, for appellants.

E. B. Crowell and *Asa Iglehart,* for respondents.

Ruger, Ch. J. Guaranties are distinguished in the law as being either general or special. Special guaranties being those which operate in favor of the particular persons only to whom they are addressed, while general guaranties are open for acceptance by the public generally. They are sometimes further classified into those limited to a single transaction and those embracing continuous or successive dealings. *Gates* v. *McKee*, 13 N. Y. 232; *Church* v. *Brown*, 21 id. 329.

The liability of the defendants in this case depends upon the solution of the question to which of these classes the guaranty in suit belongs. If it be regarded as a general guaranty, there is no just defense to this action. If, however, it is a mere special guaranty, although continuous in its character, other questions will arise for consideration. Many of the earlier cases arising upon guaranties, both here and in England, were largely controlled by the question of their negotiability; and it was uniformly held that no action would lie at the suit of an assignee upon a special guaranty because no privity existed between such assignee and the guarantor. *Robbins* v. *Bingham*, 4 Johns. 476; *Walsh* v. *Bailie*, 10 id. 180; Chitty on Bills, 273, 308 (ed. 1839); *Newcomb* v. *Clark*, 1 Denio, 226; *Birckhead* v. *Brown*, 5 Hill, 634. This obstacle was removed in this state by the Code of Porcedure, which authorized any party acquiring an interest in a guaranty to bring his action and recover thereon, provided a cause of action previously existed upon the contract in favor of his assignor. The real party in interest in such contracts is now entitled to maintain an action for damages arising from a breach of such contract in his own name, although he was not originally privy to it.

In other words the same effect is now given to an equitable that formerly pertained to a legal assignment, and they are now both equally cognizable in a court of law.

It follows that Bingham Brothers could assign to the plaintiff and the latter recover upon any cause of action accruing to them under the letter of credit in question existing against the defendants at the time of the discount of the drafts in suit.

The true distinction between general and special guaranties, as contained in letters of credit, is that upon the faith of a general guaranty any person is entitled to advance money, or incur liability, upon complying with its terms, and can recover thereon the same as though specially named therein. *Union Bank of Louisiana* v. *Coster,* 3 N. Y. 203.

In the case of a special guaranty, however, the liberty of accepting its terms is confined to the persons to whom it is addressed, and no cause of action can arise thereon except by their action in complying with its conditions.

Such a guaranty contemplates a trust in the person of the promisee, and from its very nature is not assignable until a right of action has arisen thereon, which may, like any other cause of action arising upon contract, be then assigned.

The authority of the cases holding that no privity exists between the assignee of a guaranty and the guarantor sufficient to enable the former to maintain an action thereon has thus ceased by force of the provisions of the Code.

Though this be so, the common-law rule applies to contracts of guaranty as well as to other contracts; that a consideration is necessary to render them valid; and that, unless such consideration be acknowledged by the contract itself, it is still necessary to prove one in order to recover thereon. *Leonard* v. *Vredenburgh,* 8 Johns. 29; *Bailey* v. *Freeman,* 4 id. 280; Brandt on Suretyship, 7.

It was formerly held that such contracts were void by the statute of frauds unless their consideration was also expressed upon the face of the instrument itself. *Union Bank* v. *Coster, Ex'r,* 3 N. Y. 211; *Newcomb* v. *Clark,* 1 Denio, 226.

But this rule was modified by other cases holding that where the nature of the consideration was fairly inferable from the contract sued upon, or was contained in a written instrument contemporaneously executed and forming a part of the transaction, it would satisfy the requirement of the statute. *Gates* v. *McKee, supra; Church* v. *Brown,* 21 N. Y. 315; *Douglass* v. *Howland,* 24 Wend. 35; *Leonard* v. *Vredenburgh, supra; Rogers* v. *Kneeland,* 10 Wend. 218.

The cases of *Brewster* v. *Silence* (8 N. Y. 207) and *Draper* v. *Snow* (20 id. 331), holding a contrary doctrine, have been much shaken, as authority upon this question, by the later cases above cited.

The statute of frauds was amended in this State by chapter 464 of the Laws of 1863, omitting in its re-enactment the provision requiring the consideration of a promise to answer for the debt, default or miscarriage of another, to be expressed in the writing containing such promise.

The effect of this amendment was to dispense with the necessity of such statement in the instrument itself (*Speyers* v. *Lambert,* 6 Abb. Pr. [N. S.] 309), but it left it still indispensable that a consideration in fact for the promise should exist in order to entitle the promisee to recover thereon. Brandt on Suretyship, 90.

Regarding this case, therefore, as unaffected by the questions referred to, its solution seems to depend upon the answer to be made to these two propositions: First, as to whether the guaranty in question is general or special; and second, if it be found to be a special guaranty, whether any good cause of action arose thereon in favor of the persons to whom it was addressed, which has been assigned to the plaintiff in this action. Besides a consideration, it is essential that a contract of this kind should be between proper parties, viz.: a promisor or guarantor; a principal and a promisee; and it is just as essential that such contracts should describe or refer to these parties so as to identify them, either individually or as a class.

It is always competent for a guarantor to limit his liability, either as to time, amount or parties, by the terms of his contract, and if any such limitation be disregarded by the party who claims under it the guarantor is not bound. It follows that no one can accept its propositions or acquire any advantage therefrom unless he is expressly referred to or necessarily embraced in the description of the persons to whom the offer of guaranty is addressed.

Robbins v. *Bingham, supra; Union Bank* v. *Coster, supra; Church* v. *Brown, supra; Walsh* v. *Bailie, supra; Dodge* v. *Lean,* 13 Johns. 508; Brandt on Suretyship, 88; *Bailey* v. *Ogden,* 3 Johns. 399.

In the case of a special guaranty the consideration necessary to support the promise may be either one furnished by the principal to the guarantor, or by the promisee to either the principal or some third person, according to the terms of the guaranty.

A general letter of credit is addressed to and invites people generally to advance money, give credit, or sell property in reliance upon it, and when this is done the contract is complete, and the acceptor becomes a party to it and may enforce it for his own benefit.

In such case the promisee has, upon the request of the guarantor, furnished the consideration contemplated by the guaranty and brought himself within its terms and the requirements of law. *Union Bank* v. *Coster, supra; Church* v. *Brown, supra; Birckhead* v. *Brown, supra.*

To come to the case in hand it will be found that the guaranty neither in its address nor contents refers either directly or indirectly to any other persons than the immediate parties thereto. These parties are Kaufmann & Blun, the guarantors, Feigelstock, the principal, and Bingham Bros., the promisees.

It has been said that the allusion in the letter to the word "drafts" implies the negotiation of these instruments to third persons. This idea we think is not necessarily or generally conveyed by this expression.

Drafts, as used in the collection of debts, are not usually negotiable. The office of a draft is to collect for the drawer from the drawee, residing in another place, money to which the former may be entitled, either on account of balances due or advances upon consignments, and although they may sometimes be used for raising money, that is not the necessary or ordinary purpose for which they are employed.

We might, therefore, well hold that no such doubt or uncertainty appears upon the face of this guaranty as entitles the plaintiff to furnish extrinsic evidence to determine its signification.

The plaintiff, however, claims the right to resort to such evidence to show that the defendants intended or that it had the right to infer that their guaranty was intended for such persons as should advance money upon Bingham Bros.' drafts before their acceptance by Feigelstock.

Some controversy appears by the cases to have formerly existed in respect to the rule governing the courts in the construction of guaranties, whether that should apply which entitled a surety to have his contract strictly construed, or that imposing upon a party using the language the liability of having it interpreted most strongly against him, but the weight of authority now seems to favor that construction which shall accord with the apparent intention of the parties, in conformity with the rule governing the construction of contracts generally. *Rindge* v. *Judson,* 24 N. Y. 70; *Gates* v. *McKee, supra; Dobbin* v. *Bradley,* 17 Wend. 422.

But when the meaning of the language used in a guaranty is ascertained, the surety is entitled to the application of the strict rule of construction and cannot be held beyond the precise terms of his contract. *Gates* v. *McKee,* 13 N. Y. 232; *People* v. *Chalmers,* 60 id. 158; *Kingsbury* v. *Westfall,* 61 id. 356.

When, therefore, the language of a guaranty is ambiguous and does not furnish conclusive evidence of its meaning, we are entitled to look at all of the circumstances of the case and arrive at the intention of the parties from these sources of information. *Agawam Bank* v. *Strever,* 18 N. Y. 502; Brandt on Suretyship, 106; *Walrath* v. *Thompson,* 4 Hill, 200; Fell's Law of Guaranty, 43; *Gates* v. *McKee, supra; Keate* v. *Temple,* 1 B. & P. 158; *Springsteen* v. *Samson,* 32 N. Y. 703; *Karmuller* v. *Krotz,* 18 Iowa, 352; *Hasbrook* v. *Paddock,* 1 Barb. 637.

Assuming, therefore, that there is an ambiguity in this letter requiring explanation, we will examine the case in the light of the general principles which have been stated.

The action is based upon two drafts made by Bingham Bros., of Evansville, Ind., upon A. Feigelstock, of New York, and payable respectively, one for $5,000 sixty days after date, and one for $2,500 fifteen days after sight. These drafts were discounted by the plaintiff at its bank in Evansville, at their respective dates, and the proceeds duly paid to Bingham Bros. Each of them was afterward duly protested for non-acceptance and non-payment by Feigelstock. These drafts belonged to a series of similar character discounted by the plaintiff for Bingham Bros., and were the only ones remaining unpaid by Feigelstock at their maturity.

At the commencement of this course of business Bingham Bros. produced to and left with the plaintiff the letter of credit upon which this action is founded, and it was delivered as security for the amount intended to be loaned upon such drafts.

No bills of lading or consignments of property by Bingham Bros. to Feigelstock accompanied the drafts, and that for $5,000 appeared upon its face to be an accommodation draft. No notice of these transactions was ever given to the defendants, and it did not appear that they had any knowledge of the several discounts. The letter expressing the guaranty upon which the action is brought is as follows:

"NEW YORK, December 29, 1874.

"Messrs. BINGHAM BROS., Evansville, Ind.:

"Dear Sirs—Any drafts that you may draw on Mr. A. Feigelstock, of our city, we guarantee to be paid at maturity.

"Yours truly,
"KAUFMANN & BLUN."

While the letter will be seen to be couched in broad and indefinite terms with respect to the number, amount and character of the drafts referred to, Bingham Bros. alone are addressed. However general may be the description of the subjects guaranteed, the number of persons authorized to accept its terms is not thereby enlarged.

The letter is subject to all of the limitations expressed therein, and also to such as may fairly be implied from its language, and the natural course of business transactions between its several parties. General letters of credit are, from necessity, delivered to the persons who expect to profit by their aid, and are intended to be exhibited by them wherever and whenever assistance is required. The fact of the possession of a letter of credit by a person from whom credit is sought militates against its generality. The absence in this letter of any assurance that the drafts specified should be accepted on presentation seems to imply that sight drafts alone were contemplated by the parties.

So too the absence of any reference to the consideration of this guaranty is significant, and would seem to suggest to a prudent man the propriety of an inquiry into the situation of the parties, and the nature of the business in which the guaranty was to be used before advancing largely upon the faith thereof. Such an investigation would have enabled the plaintiff to see that it was not justified in drawing the inference which it claims to have done from the language of this instrument.

Bingham Bros. resided and were manufacturers of spirits at Evansville, in the State of Indiana, remote from the guarantors and the drawee of the drafts. Feigelstock was a merchant residing in New York engaged in the business of receiving and selling on commission, goods consigned to him by third parties.

The plaintiff was a bank doing business in the State of Indiana, and the defendants were merchants in the city of New York. At the date of the guaranty these various parties were strangers to each other, except that the plaintiff and Bingham Bros. resided at the same place, and had previously had business transactions together. There is no evidence as to the relations existing between the defendants and Feigelstock, but it is claimed in the answer and was offered to be proved on the trial that they were strangers to each other, and that the guaranty was given by the defendants as a favor to a person who was in their employ, and who was a relative of Feigelstock.

There would seem to be no motive reasonably inferable from such a situation and relationship sufficiently powerful to induce the defendants to lend their unlimited credit for the benefit and advantage of Bingham Bros. alone. The contention of the plaintiff leads to the proposition that it had a right to infer that Bingham Bros. were authorized by the defendants to go to any place and with any person contract to bind the defendants for unlimited sums. Under such a construction the defendants could never revoke this authority, for it would be practicelly impossible to reach by notice all of the persons who might be applied to for advances upon this letter.

To uphold this judgment we are required to hold that the plaintiff had the right to infer from the language of the letter, and the circumstances of the case, that the defendants, without any apparent motive for so doing, had clothed Bingham Bros. with irrevocable authority to use their names in borrowing money at remote and multiplied points, for unlimited amounts and unrestricted periods of credit.

Certainly, if the plaintiff believed this, it was not justified in placing much reliance upon the continued responsibility of persons transacting business in so reckless a manner.

A transaction of such a character would be so improvident and unnatural that to establish it in any case should require the strongest evidence, but especially so when it is claimed that such powers have been conferred upon entire strangers.

The unnatural confidence in others, and the careless assumption of obligations which such a course of business would imply, is so unusual as to justify the requirement that if such an authority was intended to be conferred it should have been expressed in clear and unequivocal language.

It is obvious that neither Feigelstock nor Kaufmann & Blun could have derived any benefit or advantage from the discount of bills whose proceeds were, as appears from the face of the transaction, intended for the sole use of Bingham Bros.

Even if the relation of consignor and consignee existed between Bingham Bros. and Feigelstock, we do not think the usual course of business between such parties justifies the assumption that the use of accommodation paper for either limited or unlimited amounts is the necessary or usual accompaniment of such a connection. On the other hand, if we consider this letter as intended to furnish a credit to Feigelstock with the manufacturers and consignors of property in which he dealt, it would satisfy the apparent object of the letter, and the transaction would assume a natural and reasonable character such as pertains to the ordinary and usual course of business among commercial men.

There would necessarily be a limit to such a course of business, and the liability of the defendants would be modified by the transfer of property to correspond with the amount of the obligation assumed, and creating a liability which might be safely and reasonably incurred. Of course, if the defendants have signed a guaranty, either general or special, upon a sufficient consideration, by which they have unqualifiedly promised to become liable for the payment of all such drafts as Bingham Bros. might thereafter draw on Feigelstock, their liabilty, however comprehensive, would not be affected by its imprudence. But such is not the contract under consideration.

We are, therefore, of the opinion, from the fact that the letter was addressed to Bingham Bros. alone, the absence of any allusion to its consideration or the negotiability of the drafts therein referred to, and a consideration of the situation and relation of the parties, that the intention could not fairly be imputed to the defendants of making the guaranty contained in the letter general and open for acceptance by any one who might choose to comply with its terms.

We have been unable to find any case which either requires or authorizes the classification of this letter as a general guaranty. In each of the numerous cases cited in which the instrument considered was held to be a general guaranty, it was either addressed generally or the guaranty contained inherent evidence that it was intended to be used in obtaining credit wherever it was needed.

* * * * * * * * * *

We have thus seen that no cause of action accrued to the plaintiff upon the guaranty, for the reason that it is a special guaranty upon which the party addressed alone could act and acquire a cause of action. Some confusion has arisen in the consideration of this case from an omission to regard the obvious distinction existing between a cause of action accruing to the plaintiff in its own right, upon the discount by them of such drafts, and one arising in favor of Bingham Bros. either prior to or simultaneous with such discount of which the plaintiff now seeks to avail itself as their equitable assignee. Different considerations are required to support these different contracts. The court below reversed the judgment entered upon the report of the referee in favor of the defendants upon the grounds stated in the opinion as follows: "In the view insisted upon by the respondent the letter of credit in question in this case was a special letter or promise to Bingham Bros. In that view it was a valid contract, for it would be so read by the law as to supply the consideration so far as necessary under the former statute of frauds. 'If you will draw on him I will guarantee that any draft you may draw on Mr. A. Feigelstock of our city will be paid at maturity,' or it would be regarded an original promise under the case of *Gates* v. *McKee*, 13 N. Y. 235, and the defendants held to the established construction of such instruments."

The court here seems to imply that there are two grounds upon which the action could be maintained, viz.: because the promise was an original as distinguished from a collateral one, and secondly, because a cause of action accrued to Bingham Bros. upon making the drafts in suit, and that cause of action passed to the plaintiff as their equitable assignee by the delivery of the letter to them, and their discount of the drafts. We do not think that either of these grounds can be sustained.

It is entirely immaterial whether this guaranty be regarded as an original or collateral contract. Both equally required a consideration to support them, and the distinction between them is important only as affected by the statute of frauds, a collateral contract to pay the debt of another being required by that statute to be in writing, while an original undertaking is valid even if made by parol. No question arises respecting the validity of this promise, except in regard to its want of consideration. If, therefore, we could call this an original undertaking, the promise having, as we have seen, been made to Bingham Bros. alone, it still lacks the indispensable requirement of a consideration to support it.

This consideration must be proved, and a presumption of its existence can no more be indulged in to support the action than the presumption of any other fact material to the existence of a cause of action. Commercial and business paper generally specifies a consideration upon its face, and a defense thereto on the ground of a want of consideration must be supported by affirmative proof of such fact, but when the paper itself does not state a consideration the omission must be supplied by affirmative proof on the part of the holder, or he cannot recover thereon. (1 Parsons on Contracts, 175.) No consideration is referred to in this letter, and the drafts are the act of Bingham Bros. alone, and are evidence of no fact stated therein as against any one, except the drawers. But even the drafts do not purport to be drawn for value.

In every aspect in which this transaction can be regarded Bingham Bros. appear as the makers of the drafts for their own accommodation, and as such personally liable to all who thereafter become parties thereto.

We have no difficulty in regarding the plaintiff as the equitable assignee of any cause of action existing against the defendants in favor of Bingham Bros. As has been already stated, if any such cause of action arose, it was assignable and must be considered to have passed to the plaintiff by the delivery of the guaranty and the payment by it of the proceeds of the drafts to Bingham Bros. It thereby became the equitable owner of such cause of action and of such an interest in the letter of credit as would enable it, under our Code, to maintain an action against the defendants. But the question is presented, did any such cause of action ever arise? We have been unable to discover any ground upon which such a claim can be plausibly sustained. The letter certainly contains no reference to any consideration received by its writers, and the proof shows none advanced by Feigelstock to them or by Bingham Bros. to either Feigelstock or the guarantors.

Upon the very face of the transaction Bingham Bros. drew their drafts for their own benefit and contemplated the acceptance by Feigelstock for their accommodation. Taking the strongest view against the defendants which the case is susceptible of, they occupied simply the position of proposed accommodation guarantors of the contemplated accommodation acceptor of Bingham Bros.' drafts; and it certainly cannot be claimed that they thereby incurred any liability to the party for whose accommodation they had guaranteed such obligations. *Atkinson* v. *Manks,* 1 Cow. 692; 1 Parsons on Contracts, 184; *Thurman* v. *Van Brunt,* 19 Barb. 409; Daniel's Negotiable Instruments, § 189. Even if the letter of credit be read as paraphrased by the court below, it falls far short of establishing a consideration moving to the defendants.

It cannot be seriously claimed that a proposition, either written or oral, made by one person to another, agreeing to guarantee the payment of any draft which the other might draw, furnished a sufficient consideration for the promise. Such a request is implied in all accommodation papers as between the parties thereto, and if this were held to import a sufficient consideration, it would destroy all distinction between accommodation and genuine business obligations. But this letter of credit, as read by the court below, would not confer a cause of action upon third parties, even if it had been addressed to them, without proof that they had parted with value upon its faith. In all of the cases cited where guarantors have been held liable, even to third persons, upon such instruments, the letter embraces either an express or implied request to such persons to advance value upon the faith of the paper therein described, and it is because they have parted with value upon such request that the liability of the promisor to them is predicated. If no liability is incurrred in favor of a third party unless he has parted with value, much less can it be claimed that it is in favor of an original party to the contract, from whom, as is shown affirmatively, no consideration whatever proceeded. We are, therefore, of the opinion that the plaintiff is not entitled to maintain this action.

The order of the General Term should be reversed, and the judgment rendered upon the report of the referee affirmed.

All concur, except DANFORTH, J., not voting.

Order reversed, and judgment affirmed.

NOTE.—That part of the opinion commenting upon and distinguishing certain cases is omitted.

SINGER MAN'FG CO. *vs.* LITTLER *et al.* (1881).

56 Ia. 601; 9 N. W. 905.

Appeal from Wapello circuit court.

ACTION AT LAW. The cause was tried to the court below without a jury, and judgment was rendered for defendants. Plaintiff appeals. The facts of the case appear in the opinion.

D. F. Miller and *H. B. Hendershott*, for appellant.

Wm. McNett, for appellees.

BECK, J. 1. The action is upon a bond executed by Littler as principal, and the other defendants as sureties, conditioned that Littler shall pay to plaintiff all his indebtedness to it, existing or afterwards to exist, whether upon notes, accounts, or in any other manner. The petition alleges that Littler became agent of plaintiff for the sale of sewing machines, and the bond in suit was executed when he was appointed, to secure plaintiff from loss that might accrue on account of his employment. The petition alleges that Littler became delinquent in his payments and executed a note to plaintiff, upon which a judgment was afterward rendered for the amount of his indebtedness. The sureties answered the petition, alleging that Littler and the plaintiff entered into an agreement whereby Littler became plaintiff's agent, and became bound to pay to plaintiff money upon the sales of sewing machines, or upon the indorsement of paper taken upon such sales, as stipulated in the agreement. The agreement provides that either party may terminate the contract at their pleasure. Other conditions need not be set out.

The answer further alleges that plaintiff had terminated Littler's agency before the note was executed by him, and that the defendants had no notice at any time that Littler was in default, or that any claim was made by plaintiff against them upon the bond. Upon a demurrer to this answer, the court held that the defendants were entitled to notice of the amount due from Littler within a reasonable time after the settlement between him and plaintiff. The court found upon the trial that no such notice was given to the defendants, wherefore they suffered loss, and that plaintiff, therefore, is not entitled to recover.

2. The controlling question in the case, and the only one argued by counsel, involves the correctness of the court's ruling

in holding that defendants are not liable for the reason that notice was not given them of the extent of Littler's liability within a reasonable time after his agency was terminated, and his indebtedness fixed by his settlement with plaintiff. The ruling of the court, we think, is correct, and in accord with *Davis Sewing Machine Co.* v. *Mills*, 8 N. W. 356. We held in that case, "where the guaranty is a continuing one, and the parties must have understood their liability thereunder would be increased and diminished from time to time, and the guaranty is uncertain as to when it will cease to be binding upon the guarantor, and when the party indemnified has the power at pleasure to annul and put an end to the contract guarantied, without the knowledge of the guarantor, he is entitled to notice, within a reasonable time after the transactions guarantied are closed, of the amount of his liability thereunder." It will be observed, upon considering the statement of the terms of the contract guarantied as above set out, that they are within this rule, and that under it the defendants in this case are not liable, in the absence of the notice contemplated therein.

3. But counsel for plaintiff, in an ingenious argument, attempt to distinguish this case from *Davis Sewing Machine Co.* v. *Mills.* They insist that while the contract in that case was a guaranty, in this case defendants are not guarantors, but are sureties for Littler, and are jointly liable with him upon an original contract. The error of this position is apparent. Littler was or was about to become indebted to plaintiff upon the contract under which he was appointed agent. Defendants were not bound upon that contract. Neither were they bound upon the notes, accounts, acceptances, or upon any contract upon which Littler became indebted to plaintiff. They became first and only bound upon the bond, whereby they guarantied that Littler would pay his indebtedness to plaintiff in whatever form it assumed. A guarantor becomes bound for the performance of a prior or collateral contract upon which the principal is alone indebted. A surety is bound with the principal upon the contract under which the principal's indebtedness arises. This is a familiar doctrine of the law. Upon applying it to the facts of the case, it will be seen that defendants are guarantors, and not sureties, for the performance of the contract upon which Littler's indebtedness to plaintiff arose. They were therefore entitled to notice under the rule of *Davis Sewing Machine Co.* v. *Mills.*

It may be observed that guarantors are often called sureties. We use the term "sureties" in the foregoing discussion, to describe one who is bound by a contract with his principal—who joins with his principal in the execution of the contract, and becomes pecuniarly liable thereon. But, as we have seen, a guarantor—the surety in a contract of guaranty—is not primarily liable upon the principal's contracts, and only becomes liable upon his default. A guarantor, under this rule, is entitled to notice of the amount of his liability within a reasonable time after that liability is determined by the transaction between the original debtor and creditor.

It is our opinion that the judgment of the circuit court ought to be affirmed.

TAYLOR ET AL. *vs.* WETMORE ET AL. (1841),

10 Ohio 491.

This is an action of assumpsit from the county of Portage.

The declaration contains two special counts. In the first, it is averred that one C. D. Farrar, on November 26, 1836, being desirous of purchasing a general assortment of goods in the city of Pittsburg, for a retail country store, on a credit, and being unknown to the business men of said city, applied to the defendants, Messrs. Wetmores, then doing business at Cuyahoga Falls, in Portage county, for a general letter of credit, directed to some one or more of their correspondents in the said city of Pittsburg, by means of which the said Farrar might be enabled to make his purchases; and the said defendants upon such application, made and delivered to Mr. Farrar a letter of credit, or written guaranty, addressed to Messrs. A. D. McBride & Co., merchants in Pittsburg, in the words following: .

"CUYAHOGA FALLS, November 26, 1836.

"MESSRS. A. D. MCBRIDE & CO.

"Gentlemen: Mr. C. D. Farrar has concluded to purchase a few goods; we have that confidence in Mr. Farrar, that we will say that we will be responsible to the amount of $2,000 for goods delivered him.

"We are truly,

"C. W. & S. D. WETMORE."

And which said letter, the plaintiffs aver was taken by Mr. Farrar, and presented to Messrs. McBride & Co. at Pittsburg, who retained it, as security for themselves and such other merchants in the said city, as should, at that time and on the faith of said guaranty, sell goods on a credit to the said Farrar.

It is also averred that Mr. Farrar was unable to obtain a general assortment of goods from the house of the Messrs. McBrides, whose business was confined to that of grocers, and therefore he made application to the plaintiffs, upon the strength of the said guaranty, then in the hands of McBride & Co. referring the plaintiffs to the house of McBride & Co. and to the said guaranty; that the plaintiffs did in fact call upon McBride & Co., examined the letter of credit, and being satisfied with their statements in regard to the responsibility of the defendants, and of the guaranty, in consideration thereof, sold and delivered to Mr. Farrar, upon a credit of six months, a bill of dry goods, amounting to $760.75; of all which the defendants had due and timely notice. The plaintiffs then aver that the credit has expired, and that Farrar has omitted to pay, etc.

The second count states that on November 6, 1836, etc., in consideration that the plaintiffs at the special instance and request of the defendants, would sell to said Farrar, on credit, all such goods as said Farrar should have occasion for and require of said plaintiffs in their trade and business of wholesale dry goods merchants, they, the defendants, undertook and promised to pay the plaintiffs therefor; this count then avers the sale and delivery of goods to the amount of $760.75, on a certain credit, agreed upon between the parties, that the credit had expired, that Farrar had not paid, of which the defendants had notice; avers their liability, and breach in the non-payment.

To this declaration the defendants filed their plea of the general issue.

The testimony submitted on the part of the plaintiffs, proves: 1. The execution and delivery of this mercantile guaranty, as set forth in the first count of the declaration; and 2. That a few days after its date, it was handed to the firm of McBride & Company, who not being dealers in dry goods, the witness (who was a partner of the last mentioned firm), went with Mr. Farrar to the plaintiffs, and the said guaranty was shown to Mr. Taylor, one of the plaintiffs; the witness stated to Mr. Taylor, that he had sold a bill of groceries on the strength of the letter, and Mr. Taylor then said he would sell a bill of goods on the strength of the same, and Mr. Farrar accordingly obtained the goods. The clerk and salesman of the plaintiffs prove the amount of the goods sold to be $760.75, and on a credit of six months.

The evidence on the part of the defendants proves that Farrar was in business at Cuyahoga Falls from December, 1836, until April or May, 1837, when he transferred all his goods to the defendants, and closed his store. That he paid none of his debts in Pittsburg. That in September, 1837, the witness was present at a conversation between Taylor, one of the plaintiffs, and C. W. Wetmore, one of the defendants, in which the defendant asked Taylor, if he considered him responsible, either legally, morally, or honorably, for the goods Farrar had purchased of him. To which Taylor replied he did not, but that the defendants had more goods in their possession, received of Farrar, than they were holden to the house of McBride for; that the goods would amount to $500 or $700. To this the defendant replied he did not know how that was; that there was also left with them, by Farrar, notes and accounts to the amount of about $200, and what they could not make up out of them, must be made up out of the goods; and if there was any balance, so far as he was concerned, that should go to the plaintiffs.

Richard, for the plaintiffs.

Wood, J. Under the averments in the declaration, and the testimony submitted, are the plaintiffs entitled to judgment?—and I may here remark, in the outset, in this case, that I know of no arbitrary rule applicable to actions founded upon mercantile guaranties, which creates obligations between the parties to which they have neither expressly nor impliedly assented. In all actions founded in contract, the agreement as set forth must be proved, or the circumstances existing between the parties must be such as to leave it clearly to be inferred. In enforcing them, courts of justice, though they may sometimes be confined by technical rules, always endeavor to ascertain the understandings and intentions of the parties, and these are considered as the essence of their agreements in carrying them into execution. Mercantile guaranties are either general or special; though a single letter of credit may bear upon its face both of these distinctions. It may be general, as to the whole world, to whom the bearer may be accredited, and to any portion of whom, at his own option, he may make the guarantor a debtor, and special, as to the amount of the credit; or unlimited or general in the amount, and special as to the parties.

The first inquiry which arises here, is, whether the guaranty in question is not special as to persons. It is directed to the house of McBride & Co., in the city of Pittsburg, and nothing upon its face evincing an intention to give Farrar credit, or to incur responsibility with any other house.

The counsel for the plaintiff here admit, that a surety can not be held beyond the terms of his engagement, but they insist that although it is addressed only to McBride & Co. as it does not say "we will be responsible *to you*," it is a letter of credit to any other, who will advance the goods. It seems to us, this reasoning is more ingenious than sound. The guaranty being addressed to A. D. McBride & Co., it is to them the defendants speak when they say, "*we will be responsible to the amount of* $2,000," and it contains no general terms, by which either Farrar, or the house of McBride, had the authority to transfer it to the plaintiffs, and they to make the defendants their guarantors, without their assent, *express or implied*.

Judgment for the defendants.[1]

CLARK *et al.* *vs.* KELLOGG (1893).

96 Mich. 171; 55 N. W. 676.

Thomas A. Wilson, for appellants.

Blair & Wilson and *Parkinson & Day*, for defendant.

MONTGOMERY, J. The plaintiffs sued the defendant, counting upon a breach of an agreement given on the occasion, and in consideration, of the purchase by the plaintiffs from the defendant of a stock of goods and a quantity of notes and accounts. That portion of the agreement material to be considered in determining the questions involved reads as follows:

> "The said party of the first part * * * does covenant and agree * * * that the annexed invoice is a true statement of the amount and value of stock, merchandise, and property, and also guarantee, represent, and war-

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[1] The other points touched upon in the opinion are omitted.

rant that there is in said stock goods to the value of $14,709.68; also that the amount of $29,702.54 net shall be realized, without charging for the personal services of the parties of the second part, nor other charges of second parties, except incurred in suits, by the parties of the second part, upon the accounts and notes herein conveyed. The parties of the second part shall use due diligence in their collection."

The declaration counted upon this agreement, and set out no subsequent modification or waiver of its terms. On the trial the plaintiffs sought to recover by showing that they had dealt with the accounts as men of ordinary business judgment would, and also sought to show that the defendant had, as to a large portion of the accounts, directed the plaintiffs as to what he would require as evidence of due diligence, and that the plaintiffs had complied with the demands of the defendant in this regard.

1. The circuit judge construed the original contract as amounting to a guaranty of collection, and held that no showing of diligence was sufficient which did not include proof that the accounts had each been put in judgment, and execution had been taken out, and returned unsatisfied. This ruling was unquestionably right, if the proper construction was placed on the contract. *Bosman* v. *Akeley*, 39 Mich. 710; *Schermerhorn* v. *Conner*, 41 Id. 374.

It is contended, however, that the contract in question should not be construed as a guaranty of collection of each individual account, requiring resort to legal process in the collection of each, but amounted to a warranty and representation that there should be realized $29,702.54 from the total of the accounts; and that the fact that the amount guaranteed to be realized was much less than the face of the accounts negatives the idea that resort should be had to suit upon each account[1] The infirmity of this construction is that it ignores the subsequent language, "The parties of the second part shall use due diligence in their collection," or accords to this language a meaning at variance with the settled significance of the terms employed. What constitutes due diligence is settled by the cases of *Bosman* v. *Akeley* and *Schermerhorn* v. *Conner*, *supra*.

In the case of *Ralph* v. *Eldredge*, 58 Hun. 203, a similar question was presented. Plaintiff and defendant were co-partners. Defendant conveyed his interest to the plaintiff in the notes, accounts and demands owing to the firm. The defendant at the same time executed to the plaintiff a bond with the condition that defendant should pay to the plaintiff one-half of the amount of the notes, accounts, and claims of the late firm assigned by defendant to plaintiff that should prove to be uncollectible, if any such there should be. The court say:

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[1] Counsel cited *Taylor* v. *Soper*, 53 Mich. 96; *Koch* v. *Melhorn*, 25 Penn. St. 89; *Struthers* v. *Clark*, 30 Id. 210.

"It seems to be settled in this state that a guaranty of collection is an undertaking to pay the sum of money guaranteed, provided the principal debtor is prosecuted to judgment and execution with due diligence, and the same cannot be collected of him. * * * The plaintiff urges that the bond does not guarantee the collection of these claims, but is only a contract to pay plaintiff one-half of the amount of those which should turn out bad. But the bond uses the word 'uncollectible,' and the question must be, what is the legal meaning of that word? That word has a definite meaning, as decided in the cases above cited; and that meaning should be here enforced."

The legal signification of the term "due diligence," as applied to a guaranteed note or account, is well understood, and the parties must be assumed to have contracted with reference to that meaning.

2. The court rightly held that the alleged subsequent waiver could not be shown under the pleadings in this cause. The contract itself having fixed upon the plaintiffs a specific duty, the averment in the declaration that the plaintiffs did use due diligence amounted, in effect, to an averment that they had pursued the course which the law imposes upon them in order to charge the guarantor. If they relied on any excuse for failing to use due diligence, this should have been counted upon in the declaration. *Aldrich* v. *Chubb,* 35 Mich. 350.

Judgment affirmed, with costs.

The other Justices concurred.

DOVER STAMPING CO. *vs.* NOYES (1890).

151 Mass. 342; 24 N. E. 53.

Appeal from Superior Court, Suffolk county.

Action by Dover Stamping Company against B. B. Noyes to recover $210.20 and interest for goods sold and delivered by plaintiffs to F. P. Field & Co., the payment of which plaintiffs claim was guarantied by defendant. The guaranty relied on is contained in the following correspondence:

"BOSTON, MASS., U. S. A., NOV. 18, 1887.

"MESSRS. B. B. NOYES & CO.

"Gentlemen: We have recently become acquainted and opened trade with Messrs. F. P. Field & Co., who seem to be good fellows, without much money, but claim to be backed by you. Will you kindly tell us if this is so,—if we can consider you as having responsibility for their debts, or intending to see that they are paid. Your truly,

"DOVER STAMPING CO. C. D. F."

"GREENFIELD, MASS., NOV. 21, 1887.

"THE DOVER STAMPING CO., Boston, Mass.

"Gentlemen: We have your favor of the eighteenth instant, relating to the firm of F. P. Field & Co. As Mr. Noyes is away, writer cannot say what arrangement he has made with them as to being responsible for their bills, but should presume they would not misrepresent any arrangement they may have with him. Mr. Noyes has helped this firm some in starting, and considers them good, honest, hard-working fellows, who will be likely to meet their bills. Yours respectfully,

"B. B. NOYES & CO. Jones."

"BOSTON, MASS., U. S. A., NOV. 22, 1887.

"MESSRS. B. B. NOYES & CO.

"Gentlemen: Your favor of the twenty-first instant is at hand. We are obliged to you for your attention to our request, and glad to hear that Messrs. F. P. Field & Co. stand so well with you. We would, however, like to hear from Mr Noyes on his return. It is needful for us to know whether the statement of the young men is correct or not, as, leaving out the question of misrepresentation, they evidently have not enough of the 'sinews of war,' of their own, to carry on business successfully, however competent and energetic they may be. Your truly,

"DOVER STAMPING CO. C. D. F."

"GREENFIELD, MASS., NOV. 28, 1887.

"DOVER STAMPING CO., Boston, Mass., North Street.

"Dear Sirs: Answering yours of 22d, I am assisting F. P. Field & Co. in a small way, financially, and in a measure directing their efforts; and I have advised them to pay their bills promptly at maturity, and, if they find they are unable to do so at any time, to let me know. I think they will follow my advice in your case. If they fail to, please let me know, and I will see that you are taken care of. B. B. NOYES."

"BOSTON, MASS., U. S. A., NOV. 29, 1887.

"MESSRS. B. B. NOYES & CO.

"Gentlemen: Your esteemed favor from Mr. B. B. Noyes, in person, is received. We are much obliged for the assurance given us regarding

Messrs. F. P. Field & Co., and, on the strength of it, will be glad to continue the trade. Yours truly,

"DOVER STAMPING CO. C. D. F."

There was judgment for plaintiff. Defendant appeals.

E. Merwin, for plaintiff.

Greene & Griswold, for defendants.

KNOWLTON, J. The decision of this case depends on the proper interpretation of the correspondence relied on by the plaintiff corporation as showing a continuing guaranty by the defendant that F. P. Field & Co. would pay at maturity any debts they might contract in their dealings with the plaintiff. If these letters, fairly construed, authorized the plaintiff to sell goods to Field & Co. from time to time, to be paid for by the defendant if not paid for by the purchasers, the plaintiff is entitled to recover. The plaintiff's first letter was manifestly written in reference to possible future transactions. It says that the corporation has recently "opened trade" with Field & Co., and refers to their representation, apparently made with a view to obtaining credit. The inquiry relates to the subject of legal liability. The defendant is asked whether he will be responsible for their debts, or will see that the debts are paid. Upon receiving the letter of November 21st, written by the defendant's clerk, in his absence, and containing a recommendation of Field & Co., the plaintiff, by its letter of November 22d, said, in effect, that it was not content with a recommendation, but wanted an explicit answer to its former letter. Thereupon the defendant wrote the letter of November 28th, stating that he was financially assisting Field & Co., and promising to see that the plaintiff was "taken care of," if notified that Field & Co. failed to pay their bills promptly at maturity. This can hardly be construed as anything less than a promise to pay if the principal debtor did not. It also had reference to bills to be contracted in the future; for it was written in answer to the plaintiff's questions, and Field & Co.'s possible inability to pay promptly was spoken of as something which they might discover "at any time." If it was necessary to give notice of the acceptance of a guaranty given in this way, which we do not intimate, the plaintiff by its letter of November 29th accepted it, and notified the defendant that it would continue the trade on the strength of it. Here we find all the elements of a valid, continuing guaranty; and it is agreed that on the faith of it the plaintiff sold goods which never have been paid for, of which the defendant has had due notice. Upon the agreed facts, the plaintiff's case is made out. *Paige* v. *Parker*, 8 Gray, 211; *Bent* v. *Hartshorn*, 1 Metc. 24; *Jordan* v. *Dobbins*, 122 Mass. 170.

Judgment for the plaintiff.

E. A. SHERBURNE *vs.* J. W. BUTLER PAPER CO. (1891).

40 Illinois App. 383.

E. A. Sherburne, pro se.

Messrs. *McClellan & Cummins* and *Lemuel H. Foster*, for appellee.

WATERMAN, J. The evidence in this case was that appellant gave to appellee the following guaranty:

GUARANTY.

"In consideration of one dollar ($1.00) to me in hand paid by the J. W. Butler Paper Company, of Chicago, Illinois, the receipt whereof is hereby acknowledged, and for other good and valuable considerations, I hereby guarantee to the said J. W. Butler Company the payment, at maturity, of any bills of account due them for merchandise hereafter from time to time sold and delivered by them to the Eureka Roofing Company, of Chicago, whether sold on open account or on notes to the amount of $30, on twenty days' time.

"And I hereby authorize the said J. W. Butler Paper Company to extend the time of payment in any manner that may be agreed upon between them and the said Eureka Roofing Company, without any notice to me, and no such extension of time of payment shall affect my liability on this guaranty.

"This said guaranty to remain in full force and effect until revoked by me in writing.

"Witness my hand and seal at Chicago, this 9th day of December, A. D. 1884

(Signed) "E. A. SHERBURNE, [seal]
"115 Monroe St."

That thereafter appellee delivered roofing felt to the Eureka Roofing Co., and charged to it upon its books such goods to the amount of $51.40.

Appellee also introduced, without objection, a letter, purporting to be signed by appellant, stating that he had a note from Mr.

Fuller of the Roofing Co., "to the effect that he had arranged that $27.65 of the J. W. Butler Paper Co." The original entry book of the Paper Company, showing the charges, was introduced without objection. The bill had been repeatedly presented to the Roofing Company.

The guaranty was a continuing one. It distinctly guarantees the payment, not of one bill or specified bills, but of any bills to the amount of $30. Brandt on Suretyship and Guaranty Sec. 130; *Lowe* v. *Beckwith,* 14 B. Monroe (Ky.) 150; *Murray* v. *Raynor,* 22 Pick. 223.

The only evidence of the payment of anything by the Roofing Company was contained in the bill presented to it for payment.

The finding and judgment for $27.50 of the court below was in accordance with the law and the evidence, and the judgment is affirmed.

Judgment affirmed.

SMITH ET AL., Appellant, *vs.* VAN WYCK, Respondent., (1890), 40 Mo. App. 522.

Jenkins & Wells, for appellant.

C. O. Tichenor, for respondent.

SMITH, P. J. * * * The plaintiffs sued defendant upon this undertaking:

> "KANSAS CITY, MO., July, 1885.
>
> "I hereby guarantee the payment of bills as they mature, purchased by E. S. Mendenhall, of R. P. Smith & Sons, of Bloomington, Illinois, to the amount of thirteen hundred dollars ($1,300).
>
> "T. C. VAN WYCK,
> "1501 East Eighteenth Street."

For a bill of goods amounting to $1,240.60, sold by plaintiffs to said Mendenhall. The facts and circumstances surrounding the execution of the said undertaking, and the relation of the parties thereto, and to each other, may be summarized thus: Defendant had rented to Mendenhall a store and business house. Mendenhall had placed with one of the plaintiffs, who were wholesale merchants, an order for goods amounting from thirteen hundred to seventeen hundred dollars. The plaintiffs hesitated about filling the order, and one of them went to defendant and told him that Mendenhall had placed with them an order for goods to the amount stated, and that they did not like to fill the same unless defendant would guarantee the payment thereof; that if defendant would give his guaranty for thirteen hundred dollars, and if they sold Mendenhall more goods than that, on such excess they would take their chances for collecting. That thereupon the defendant signed the undertaking sued on. The plaintiffs delivered Mendenhall goods to the amount of the defendant's guaranty, for the payment of which the defendant furnished part of the money. The plaintiffs thereafter continued to sell goods to Mendenhall for about two years, amounting in the total to several thousand dollars. Finally Mendenhall failed, owing the plaintiffs on account of such sales the amount sued for. It may be well doubted whether any question of interpretation of the said undertaking properly arises on the abstract of the record before us, and at which alone we can look. But, waiving the consideration of that question for the present, we may state that it appears to us that if we interpret the language of the said undertaking in the light of a knowledge of the relation of the parties, their antecedent acts, and of the subject-matter of the same, as we have the right to do; 2 Parsons on Contracts [7 Ed.] top p. 564; *Edwards* v. *Smith*, Adm'r, 63 Mo. 119; *Bunce*, Adm'r, v. *Bick's* Ex'r, 43 Mo. 266; *Hutchinson* v. *Bowker*, 5 Mees. & W. 535; *Black River L. Co.* v. *Warner*, 93 Mo. 374, it becomes quite obvious that it cannot be held to be a continuing one, and this, too, in view of the maxim, *verba fortius accipiuntur contra proferentem*. It is held in this state that when it is doubtful from the language contained in the contract, whether the guaranty was for a single dealing or a continuous one, the true principle of sound ethics is not to set up a presumption for or against the guarantor, but to give the contract the sense in which the person making the promise believed the other party to have accepted it, if, in fact, he did accept it. *Boehne et al.* v. *Murphy*, 46 Mo. 57; *Shine's Adm'r* v. *Bank*, 70 Mo. 524. Extrinsic evidence cannot be received to contradict, add to, subtract from or vary the terms of a guaranty, but, as has been stated, when its meaning is doubtful, or obscurely expressed, parol testimony in relation thereto, requisite to a clear understanding of its purport, is admissible. The very language of the instrument sued on negatives the idea that it was intended to be a continuing guaranty. When the relation of the parties, and the circumstances under which the guaranty in question was entered into, are considered, its meaning becomes quite apparent. The fact that plaintiffs had sold Mendenhall goods amounting to thirteen hundred dollars, and that they would not deliver the same to him without defendant would guarantee the payment thereof, coupled with the further fact that this amount was inserted in the instrument, for which defendant bound himself for "bills as they mature, purchased"—not to be purchased—conclusively shows that the transaction and undertaking related solely and entirely to the unfilled order, or orders, for goods plaintiff had received of Mendenhall, at the time of the execution of the contract, and not to subsequent sales and purchases. We think that upon the record before us the judgment of the circuit court was for the right party. The exceptions to the rulings of the court in respect to the introduction of evidence were not preserved by a motion for a new trial, as appears by the abstract. But, whether this is so or not, it is quite evident that none of these adverse rulings of the court to the plaintiffs materially affected the merits of the case. Indeed, the plaintiffs, in their brief, make no point in respect to that matter.

The judgment, with the concurrence of Judge ELLISON, Judge GILL not sitting, will be affirmed.

HENRY MCSHANE CO., L'T'D., *vs.* PADIAN (1894).

142 N. Y. 207; 36 N. E. 880.

APPEAL from common pleas of New York city and county, general term.

Action by the Henry McShane Company, Limited, against William Padian. From a judgment of the general term affirming a judgment for defendant, plaintiff appeals. Reversed.

Thos. C. Ennever, for appellant.

William J. Fanning, for respondent.

BARTLETT, J. The plaintiff seeks to recover of the defendant upon the following guaranty: "I, William Padian, hereby guaranty to the Henry McShane Company, Limited, the payment by John P. Wiegers, plumber, to them for any and all materials which they may deliver to John P. Wiegers, I not to be liable for any balance exceeding five hundred dollars which may become due. William Padian. Witness: Wm. H. Barth. Dated New York, March 31st, '00." This case was tried before a referee, who held that the guaranty was susceptible of two constructions, and admitted, to quote from his opinion, "oral evidence of the *res gestae* so as to arrive at the probable intention of the parties." The evidence was admitted against the objection and exception of plaintiff. Upon conflicting evidence, the referee found, substantially, that the guaranty had reference to certain goods sold by plaintiff to John P. Wiegers, to be used in the performance of a contract named, and that, before the commencement of this action, Wiegers had paid for them. He further found that said guaranty was not intended by the parties thereto as a running or continuing guaranty, other than for the goods already referred to, and dismissed the complaint, with costs. The general term of the court of common pleas for the city and county of New York affirmed a judgment for the defendant entered upon the report of the referee. The question presented on this appeal is whether the language of the guaranty is so ambiguous as not to furnish conclusive evidence of its meaning, and entitles the defendant to prove the circumstances under which it was executed, so that the court can construe it in the light of all the facts. If this ambiguity exists, the evidence of the circumstances surrounding the execution of this guaranty was properly admitted (*Bank* v. *Kaufman*, 93 N. Y. 281, and cases cited; *Bank* v. *Myles*, 73 N. Y. 341), and, as the findings of the referee were made on conflicting evidence, they are not reviewable in this court (*Sherwood* v. *Hauser*, 94 N. Y. 626; *Fire Department of New York* v. *Atlas S. S. Co.*, 106 N. Y. 578, 13 N. E. 329; *Crim* v. *Starkweather*, 136 N. Y. 635, 32 N. E. 701). We are, however, unable to agree with the learned court below in its construction of this guaranty. We regard its language as clear, presenting no ambiguity, and as creating a continuing guaranty, which, by its terms, limits defendant's liability to any balance, not exceeding $500, which may become due, but does not undertake to regulate the amount of John P. Wiegers' future transactions with the plaintiff. The cases are numerous, construing instruments of this character, and it is not always an easy task to determine on which side of the line separating continuous from limited liability they belong. In *Whitney* v. *Groot*, 24 Wend., at page 84, Chief Justice Nelson remarks: "It is, in most of these cases, a nice and difficult question to determine whether the guaranty is a continuing one or not. The intent of the party, to be derived from the words, is the only sure guide; and therefore very little aid is to be derived from the adjudged cases, as they turn upon the peculiar phraseology of the guaranty." In *Bank* v. *Myles*, 73 N. Y., at page 341, Judge Earl says: "Precedents do not help much in the construction of such instruments." In *Gates* v. *McKee*, 13 N. Y., at page 234, Judge Denio says: "The cases are not entirely harmonious as to the principles of construction which ought to govern in this class of cases, but the weight of authority is altogether in favor of construing guaranties by rules at least as favorable to the creditor as those which courts apply to other written instruments, irrespective of the consideration that the guarantor is a surety." In the leading English case of *Mason* v. *Pritchard*, 12 East, 227, the court said the words were to be taken as strongly against the party giving the guaranty as the sense of them would admit. The supreme court of the United States has also expressed the same views. *Drummond* v. *Prestman*, 12 Wheat. 515; *Douglass* v. *Reynolds*, 7 Pet. 113, 122; *Lawrence* v. *McCalmont*, 2 How. 426.

Applying these principles to the guaranty now under consideration, it leads to the construction we have already indicated. The usual and ordinary import of its language discloses an intent on the part of the defendant to guaranty the purchases of Wiegers from plaintiff of any and all materials, provided his liability was not to exceed $500, or any balance which might become due. To place upon this instrument the construction contended for by defendant is to ignore its plain provisions, and import into the case an entirely new contract. The defendant contends he was only guarantying payment of $395 worth of specific materials which were to be used in the performance of a certain building contract. On the other hand, the plaintiff states that Wiegers was a young man starting in business, and it was customary to require a guaranty in such cases. The evidence in the case shows that Wiegers, after the execution of the guaranty, made purchases of plaintiff aggregating between six and seven thousand dollars, and made payments of between four or five thousand dollars, and owed plaintiff a balance of twenty-two hundred dollars when this action was commenced. We hold, however, that parol evidence was inadmissible as to surrounding circumstances to aid in construing this guaranty, and rest our decision upon the language of the instrument solely. The answer of the defendant alleges that he was induced to sign the guaranty by the false and fraudulent representations of plaintiff, made through its agents. The proof failed to establish this defense, and the referee made no such finding. The judgment appealed from must be reversed, and a new trial ordered, with costs to abide the event. All concur.

Judgment reversed.

ABBOTT *vs.* BROWN (1889),

131 Ill. 108, 22 N. E. 813.

Appeal from Appellate Court, First District.

ASSUMPSIT by Henry G. Abbott against John B. Brown. The circuit court rendered judgment for defendant, and the appellate court affirmed the judgment. Plaintiff appeals.

Osborne Bros. & Burgett, for appellant.

Osburn & Lynde, for appellee.

CRAIG, J. On the 1st day of July, 1876, Kirk B. Newell, being indebted to H. G. Abbott, the appellant, executed his promissory note as follows:

> "CHICAGO, ILLS., July 1, 1876.
>
> "One day after date I promise to pay to the order of H. G. Abbott two thousand dollars, with interest at the rate of ten per cent. per annum, at First National Bank of Chicago. Value received.
>
> (Signed) "KIRK B. NEWELL."

Indorsed on the back of the note was the following guaranty:

> "For value received, I hereby guaranty the payment of the within note at maturity, or at any time thereafter, with interest at ten per cent. per annum until paid, and agree to pay all costs and expenses paid or incurred in collecting the same, including attorney's fees.
>
> (Signed) "J. B. BROWN."

This action was brought by H. G. Abbott against Brown to recover certain costs and attorney's fees which he paid out and expended in the collection of the amount named in the note in an action against Brown on his guaranty. The costs and attorney's fees which the plaintiff sought to recover in the action were not expended in attempting to collect the note which was executed by Kirk B. Newell. No suit was ever brought on the note against the maker, nor was any evidence offered to prove that any costs or expenses were ever incurred in an attempt to collect the note. But on the trial of the cause Abbott, who is appellant here, put in evidence, showing that on July 3, 1882, he brought an action in assumpsit against Brown "on the guaranty signed by him, indorsed on the note, whereby he guarantied payment of the note," in which he recovered judgment for the amount due on the note, $3,338.34; that an appeal was taken by Brown to the appellate court, and to the supreme court from the judgment of the appellate court affirming the judgment of the circuit court, and that upon the affirmance thereof by the supreme court Brown paid appellant the amount of the judgment; that the firm of which witness was a member was employed as attorneys to conduct this action, and rendered services therein of the value of $1,500, and they had been paid that sum by appellant for said services; and, also, in the prosecution of this action, appellant expended for printing and other necessary expenses the sum of $26. On this evidence the circuit court held, as a matter of law, "that the guaranty on which this suit was brought is not an agreement to pay the costs or expenses or attorney's fees, paid or incurred in a suit against Brown upon said guaranty," and rendered judgment for the defendant.

There is no ambiguity in the contract of guaranty executed by Brown. The terms of the contract are plain and easily understood. By the contract Brown agreed that the note should be paid with interest at ten per cent, and he also agreed to pay all costs and expenses incurred or paid, including attorney's fees, in collecting the note. Obviously the meaning of the language used was, if costs and expenses and attorney's fees were incurred in the collection of the note and interest from the maker, then such costs, expenses, and attorney's fees should be paid by Brown. If the contract of Newell, the maker of the note, and the contract of guaranty by Brown, was but one contract, the position of appellant that the action on the guaranty was an action on the note might be regarded more plausible; but such is not the case. Daniel, Neg. Inst. § 1752, defines a contract of guaranty as follows: "A 'guaranty' is defined to be a promise to answer for the payment of some debt or the performance of some duty in case of the failure of another person who is in the first instance liable to such payment or performance." 2 Pars. Cont. 3, says: "Guaranty is held to be the contract by which one person is bound to another for the due fulfillment of a promise or engagement of a third party." Story, Prom. Notes, § 457, says: "A guaranty, in its legal and commercial sense, is an undertaking by one person to be answerable for the payment of some debt, or the due performance of some contract or duty, by another person, who himself remains liable to pay or perform the same." In *Dickerson* v. *Derrickson,* 39 Ill. 574, this court, in speaking of a guaranty, says: "The contract of an absolute guaranty is that if the principal fails to pay, the guarantor will. If it were not so, it would not be a guaranty, but an independent undertaking." See, also, *Rich* v. *Hathaway,* 18 Ill. 548. Here, Newell, as maker of the promissory note, agreed to pay a certain sum of money at a certain time. By his contract he became liable on the note; but Brown, as guarantor, was not liable with him. No joint liability existed. In Baylies, Sur. 389, the author says: "In an action to enforce a contract of guaranty the guarantor is the proper party defendant, and the principal debtor should not be joined. As has been shown, all the parties to a contract of suretyship may be joined as defendants; but a guarantor cannot be sued with his principal, for his engagement is strictly an individual contract, and not an engagement jointly with his principal."

Here Brown's engagement as guarantor was his individual contract, under which he became bound to pay in case the maker of the note failed to do so. When the maker of the note failed to pay at maturity of the instrument, the guarantor then, and not before, became liable, on his contract of guaranty, to an action. The liability of the maker of the note and the guarantor were separate and distinct. To enforce the liability of the maker an action should be brought on the note against him, while to enforce the liability of the guarantor an action could only be brought on the contract of guaranty; and it seems plain that an agreement to pay costs and attorney's fees which might be incurred in one action does not include costs and attorney's fees incurred in the other. Here Brown, by the terms of his guaranty, bound himself to pay costs and expenses, including attorney's fees, which might be incurred in an action to collect the note, but he saw proper not to agree to pay such costs and expenses as might be incurred in an action brought on the contract of guaranty; and in the absence of such an agreement we are aware of no principle which would make him liable. Had a suit been brought on the note against the maker, under the contract of guaranty, Brown would have been liable for such costs and expenses, including attorney's fees, as might have been incurred in that action; but no such action was brought, and there has been no breach of his contract so far as costs and expenses are concerned.

One other question remains to be considered: On the trial the appellant offered to show that he employed counsel to "watch Brown from 1878 to 1882, and the business operations in which he was engaged, to see when there was a reasonable prospect for collecting the note out of him." Also that in April, May, June, and July, 1882, his attorney had negotiations with Brown for the settlement of his liability on the guaranty for which the services of counsel were worth $50, and which sum appellant had paid. As to those services the appellate court held if they were a proper charge against appellee, they should have been included in the former suit. We concur in the view of the appellate court, if any liability existed for those services, as they had been rendered before appellee was sued on the guaranty, they should have been embraced in that action. The judgment of the appellate court will be affirmed.

McMurray *et al. vs.* Noyes (1878).

72 N. Y. 523.

Esek Cowen, for appellant.

Irving Browne, for respondent.

Rappallo, J. The guaranty on which this action is brought is contained in an assignment of a bond and mortgage, and is in the following form:

> "I hereby covenant * * * that in case of foreclosure and sale of the mortgaged premises described in said mortgage, if the proceeds of such sale shall be insufficient to satisfy the same, with the costs of foreclosure, I will pay the amount of such deficiency to the said party of the second part, or its assigns, on demand."

On the part of the appellants, it is contended that this guaranty is subject to the rules applicable to guaranties of collection, and thus laches in foreclosing the mortgage, after default, is a defense. The respondents insist that it is a guaranty of payment, and that they were under no obligation to use diligence in endeavoring to collect the mortgage debt by foreclosure.

The fundamental distinction between a guaranty of payment and one of collection is, that in the first case the guarantor undertakes unconditionally that the debtor will pay, and the creditor may, upon default, proceed directly against the guarantor, without taking any steps to collect of the principal debtor, and the omission or neglect to proceed against him is not (except under special circumstances) any defense to the guarantor; while in the second case the undertaking is that if the demand cannot be collected by legal proceedings the guarantor will pay, and consequently legal proceedings against the principal debtor, and a failure to collect of him by those means are conditions precedent to the liability of the guarantor; and to these the law, as established by numerous decisions, attaches the further condition that due diligence be exercised by the creditor in enforcing his legal remedies against the debtor.

These rules are well settled and are not controverted, and the only question is to which class of guaranties the one now before us belongs.

It is apparent upon the face of the instrument that the undertaking of the defendant was not an unconditional one that the mortgagor should pay, or that the guarantor would pay on default of the mortgagor, but only that the guarantor would pay, in case of a deficiency arising on a foreclosure and sale. The foreclosure and sale were consequently conditions precedent, and the general principle is, that wherever a condition precedent is to be performed for the purpose of establishing the liability of a surety or guarantor, such condition must be performed in good faith and with due diligence. It is upon this principle that, in case of a guaranty of collection, diligence is required of the creditor.

I am unable to see why this principle is not applicable to the guaranty now in controversy. The respondents claim that it is an undertaking to pay any deficiency which may arise, and is, therefore, a guaranty of payment of the mortgage debt to that extent, and to be governed by the same rules as if it had been a guaranty of payment of the whole mortgage. But the fallacy of this reasoning is that it is not an unconditional guaranty that the mortgagor will pay the mortgage debt, or any part of it, but only that after the remedy against the land has been exhausted, and the deficiency ascertained by foreclosure and sale, the guarantor will pay such deficiency. The only difference between this and an ordinary guaranty of collection is, that in the latter case the undertaking is that after it has been ascertained by all such legal proceedings as the case admits of, that the demand cannot be collected, the guarantor will pay; while in the present case the only proceedings which the creditor is bound to adopt are a foreclosure of the mortgage and sale of the mortgaged lands. To that extent the condition precedent exists alike in both cases, and the duty of exercising due diligence attaches, there being nothing in the instrument qualifying or dispensing with it.

The case of *Goldsmith* v. *Brown* (35 Barb. 484) is relied upon by the respondents as sustaining their position. In that case the covenant was, as construed by the court, to pay the deficiency upon the mortgage debt *whenever* the remedy against the lands mortgaged should have been exhausted and the deficiency ascertained. The decision in that case can only be sustained by construing the covenant as waiving diligence in foreclosing, and binding the covenanter to pay the deficiency without regard to the time of the foreclosure. Nothing in the covenant now under examination has any relation to the time of the foreclosure, or can be construed as waiving diligence required by the general rules of law in performing the condition.

The delay in foreclosing in the present case was fourteen months after the mortgage debt became due. During upward of ten months of this time the property was a sufficient security, but afterward the buildings thereon were destroyed by fire, and the value was reduced below the amount of the mortgage debt. It cannot be questioned that this delay was sufficient to constitute *laches*. In *Craig* v. *Parkis*, 40 N. Y. 181, a delay of six months in foreclosing a bond and mortgage was held to be *laches* which discharged a guaranty of its collection.

The judgment should be reversed, and a new trial ordered, with costs to abide the event. All concur.

Judgment reversed.

ROBERTS *vs.* HAWKINS (1888).

70 Mich. 566; 38 N. W. 575.

Error to Superior Court of Grand Rapids. *Assumpsit.*

Norris & Norris, for appellant.

J. C. FitzGerald (*Charles Chandler*, of counsel), for plaintiff.

LONG, J. January 12, 1884, one Lyman D. Follett made his promissory note as follows:

"$1,000.

GRAND RAPIDS, MICH., January 12, 1884.

One year after date, I promise to pay to the order of Helen M. Roberts one thousand dollars, with interest at eight per cent. per annum. Value received. LYMAN D. FOLLETT."

And defendant signed an indorsement on the back thereof, as follows:

"For value received, I hereby guarantee the payment of the within Value received. L. E. HAWKINS."

On the delivery of this note to plaintiff, she paid Follett $1,000. January 8, 1885, seven days before this note became due, Follett paid one year's interest; and neither at that time, nor at the maturity of the note, was the same presented to Follett or defendant for payment. No notice of non-payment was given defendant then or at any time prior to June 8, 1887. January 15, 1886, Follett paid the interest for the next year, and January 17, 1887, for the year following. About June 8, 1887, the note being then two years and five months overdue, it was first presented to defendant, and payment demanded and refused. August 13 this suit was brought.

On the trial, plaintiff, having proved the note and guaranty, and its non-payment, rested. Defendant then sought to make his defense as pleaded, and offered to show—

1. That he was an accommodation guarantor, without consideration or security.

2. That, at or about the maturity of the note, he inquired of the maker of the note if it was paid, and was told it was.

3. That neither at the maturity of the note, nor at any subsequent time, prior to June 8, 1887, was any notice of the non-

payment of this note given to defendant, nor any demand made on him for the payment thereof.

4. That at the maturity of this note, and for some considerable time thereafter—at least a year—Follett, the maker of the note, was solvent, and had property out of which defendant could have procured him to pay the note or obtained security.

5. That when defendant, on June 8, 1887, learned of the non-payment of this note, the maker was insolvent, out of the jurisdiction, and that he could then obtain no security or payment.

The court directed a general verdict for plaintiff on all the counts of the declaration. Judgment being entered on the verdict in favor of plaintiff for the amount of the note and interest, defendant brings the case into this Court by writ of error.

The declaration contains three counts. The first alleges the guaranty, demand of the maker at maturity, non-payment, and notice of said demand and non-payment to defendant at maturity.

The second alleges the guaranty, the refusal by maker to pay at maturity, and notice to defendant, at maturity, of maker's refusal.

The third is the common counts in *assumpsit*, with copy of note annexed, and an alleged indorsement on back of L. E. Hawkins, without any guaranty over it.

The plea is the general issue, with notice of the defense of release by plaintiff's failure to give notice of non-payment to defendant, and the consequent damage and loss to him thereby.

It is claimed that the court erred in receiving the note and guaranty in evidence under the third count in plaintiff's declaration, for the reason that the note and guaranty offered were not the note and guaranty set forth in that count; that the contract set out in plaintiff's third count was that defendant had indorsed his name in blank on the back of the note, not payable to his order; and that this would make him a maker of the note, and liable as such, while the note offered had a guaranty of payment indorsed thereon. Defendant claimed that this was a variance, and that the court should have excluded the guaranty under this third count, and confined the verdict to a recovery under the first two counts.

As we view the case, however, this objection has no force. The plaintiff being entitled to recover under the first and second counts of the declaration, the defendant was not prejudiced in the

Henry E. Carter

course taken by the court in not withdrawing all consideration of the case under the third count. The declaration was sufficient in the first two counts to allow a recovery thereunder.

The chief error complained of is the exclusion of the entire defense, and the direction of a verdict for plaintiff. On the trial the plaintiff proved by a witness the application for the loan, the loaning of the money, the giving of the note and guaranty, and, after reading the note and guaranty in evidence, rested. The defendant was then called and sworn as a witness in his own behalf, and was asked by his counsel:

> "Q. When that note became due, in January, 1885,—January 15,—was any notice given you of the fact that it remained unpaid?"

To this question counsel for plaintiff objected, that the same was irrelevant and immaterial; that the defendant was not an indorser nor guarantor of collection, but of payment of the note.

Counsel for the defendant then offered to show by the witness that he had no notice of the non-payment of the note prior to June 8, 1887; that he was an accommodation guarantor without security; that, at or near the maturity of the note, he inquired of the maker, and was informed that it was paid; that, at the time, the maker of the note was solvent, and for some considerable time thereafter—probably a year—and that the defendant could, if he had any knowledge of its non-payment, have secured himself, or procured the maker to pay it; that, when the defendant learned of the non-payment of the note, the maker was insolvent, and out of the State, and no security could have been obtained by the defendant; the counsel then saying—

> "That this, of course, is the line of defense marked out by the notice in the pleadings. It is all covered by my brother's argument; and, if we have no right to show that defense, then, of course, there remains nothing but for the court to direct a verdict for the amount of the note, and interest."

The court sustained the objection, and directed a verdict for plaintiff.

In considering the case, the defendant's offer to prove this state of facts must be taken as true. *Clay, etc., Ins. Co.* v. *Manufacturing Co.*, 31 Mich. 356. Under this offer by the defendant, the issue is made: Is a person not being a party to a promissory note, who at its date and before delivery, and for the purpose of having a loan made upon the strength of his guaranty, guarantees the payment of such note, liable thereon in case the note is not paid at maturity, without notice of non-payment having been given to him by the holder at the maturity of the note, or within a reasonable time thereafter; or in case notice is not given, and no proceedings taken to collect the note from the maker, and the maker of the note, at the maturity thereof, was solvent, and subsequently, and before suit is brought on the guaranty, becomes insolvent, can such guarantor, when such action is brought against him, set up such insolvency as a defense? The defense being based on plaintiff's laches in not giving notice to the defendant of the non-payment of this note at maturity, and the consequent damage to defendant thereby, the correctness of the court's ruling depends on whether or not there rested on the plaintiff the duty to give such notice under any circumstances.

The defendant claims that his liability existed only on the happening of a contingency and the performance of a condition; that whether or not that contingency happened, or condition was performed, was matter peculiarly within the knowledge of the plaintiff, and not within his own; and that if plaintiff intended to assert the performance of the condition, or the happening of the contingency, whereby alone defendant was to become liable, it was her duty to do so within a reasonable time, and, in any event, before the maker of the note became insolvent and a fugitive; that her neglect to do so, and the damage to him thereby, has released him from the obligation of his conditional contract.

The position, however, of a guarantor of payment, as between him and the maker of the note, is that of a surety. It is a common-law contract, and not a contract known to the law-merchant. It is an absolute promise to pay if the maker does not pay, and the right of action accrues against the guarantor at the moment the maker fails to pay. The guarantor would not be discharged by any neglect or even refusal on the part of the holder of the note to prosecute the principal, even if the maker was solvent at the maturity of the note, and subsequently became insolvent; and the fact that no notice of non-payment was given the guarantor at the maturity of the note, or at any time before bringing suit, would not affect the rights of the holder of the note against the guarantor. The guarantor's remedy was to have paid the note, and taken it up, and himself proceeded against the maker.

A guaranty is held to be a contract by which one person is bound to another for the due fulfillment of a promise or engagement of a third party. 2 Pars. Cont. 3.

The contract or undertaking of a surety is a contract by one person to be answerable for the payment of some debt, or the performance of some act or duty, in case of the failure of another person who is himself primarily responsible for the payment of such debt or the performance of the act or duty. 3 Add. Cont. Sec. 1111; 3 Kent, Comm. 121; *Wright* v. *Simpson*, 6 Ves. 734.

In the case of *Pain* v. *Packard*, 13 Johns. 174 (decided in 1816), it was held that if the surety call upon the creditor to collect the debt of the principal, and he disregard that request, and thereby the surety is injured, as by the subsequent insolvency of the principal, the surety was thereby discharged. A directly contrary decision was given by Chancellor Kent, upon argument and full consideration, the following year. *King* v. *Baldwin*, 2 Johns. Ch. 554. Two years later the last decision was reversed by the court of errors by casting vote of the presiding officer, a layman, and against the opinion of the majority of the judges. *King* v. *Baldwin*, 17 Johns. 384.

In the case of *Brown* v. *Curtiss*, 2 N. Y. 226 (decided in 1849), the action was brought against the guarantor of a promissory note. On the trial it was admitted that there had been no demand of the maker, nor any notice of non-payment, and the note was dated April 2, 1838, and payable six months after the date. The suit was brought against the guarantor in September, 1845. The defendant offered to prove that, from the time the note fell due until the latter part of 1843, the maker was able to pay the note; that he then failed, and was insolvent at the time of the commencement of the suit, and still remained so. This evidence was objected to, and excluded, and verdict directed for plaintiff. The court (at p. 227) says:

> "The undertaking of the defendant was not conditional, like that of an indorser; nor was it upon any condition whatever. It was an absolute agreement that the note should be paid by the maker at maturity. When the maker failed to pay, the defendant's contract was broken, and the plaintiff had a complete right of action against him. It was no part of the agreement that the plaintiff should give notice of the non-payment, nor that he should sue the maker, or use any diligence to get the money from him. * * * Proof that when the note became due, and for several years afterwards, the maker was abundantly able to pay, and that he had since become insolvent, would be no answer to this action. The defendant was under an absolute agreement to see that the maker paid the note at maturity. * * *

> "If the defendant wished to have him sued, he should have taken up the note, and brought the suit himself. The plaintiff was under no obligation to institute legal proceedings."

The weight of authority, both in this country and in England, sustains this doctrine, and we think with much good reason. *Bellows* v. *Lovell*, 5 Pick. 310; *Davis* v. *Huggins*, 3 N. H. 231; *Page* v. *Webster*, 15 Me. 249; *Dennis* v. *Rider*, 2 McLean, 451.

In *Train* v. *Jones*, 11 Vt. 446, it is said:

"An absolute guaranty that the debt of a third person shall be paid, or that *he* shall pay it, imposes the same obligation upon the guarantor. In either case, it is an absolute guaranty of the sum stipulated, and the creditor is not bound to use diligence, or to give reasonable notice of non-payment." *Noyes* v. *Nichols*, 28 Vt. 174.

In *Bloom* v. *Warder*, 13 Neb. 478 (14 N. W. Rep. 396), which was an action against the guarantors of payment of a promissory note, the court says:

"This is an absolute contract, for a lawful consideration, that the money expressed in the note shall be paid at maturity thereof at all events, and depends in no degree upon a demand of payment of the maker of the note, or any diligence on the part of the holder."

Mere passiveness on the part of the holder will not release the guarantor, even if the maker of the note was solvent at its maturity, and thereafter became insolvent. *Breed* v. *Hillhouse*, 7 Conn. 528; *Bank* v. *Hopson*, 53 Conn. 454 (5 Atl. Rep. 601); *Foster* v. *Tolleson*, 13 Rich. Law, 33; *Machine Co.* v. *Jones*, 61 Mo. 409; *Barker* v. *Scudder*, 56 Id. 276; *Norton* v. *Eastman*, 4 Greenl. 521; *Brown* v. *Curtiss*, 2 N. Y. 225; *Allen* v. *Rightmere*, 20 Johns. 365; *Bank* v. *Sinclair*, 60 N. H. 100; *Gage v. Bank*, 79 Ill. 62; *Hungerford* v. *O'Brien*, 37 Minn. 306 (34 N. W. Rep. 161).

It follows that, this being an absolute undertaking on the part of the defendant as guarantor to pay the amount of this note at maturity in the event of the default of payment by the principal, the guarantor could not demand any diligence on the part of the holder of the note to collect the same from the principal. It was his duty to perform his contract—that is, to pay the note upon default of the principal; and it is no answer for him to say that the principal was solvent at the maturity of the note, and that the same could then have been collected of him by the holder, and that he has since become insolvent. If he wished to protect himself against loss, he should have kept his engagement with the holder of the note, paid it upon default of the principal, taken up the note, and himself prosecuted the party for whose faithful performance of the contract he became liable.

The court properly directed the verdict for the plaintiff; and the judgment of the court below must be affirmed, with costs.

The other Justices concurred.

SMITH *vs.* MOLLESON (1896),

148 N. Y. 241; 42 N. E. 669.

Appeal from Supreme Court, general term. First department.

William C. Beecher, for appellant.

Jacob F. Miller, for respondent.

O'BRIEN, J. The defendant has been held liable as surety upon a bond given to secure the performance, by the contractors, of a building contract, dated November 1, 1888, in which they agreed to furnish, cut, set and clean all the new granite work for the enlargement of a public building in the City of New York. The plaintiff agreed to pay the contractors for this work the sum of $30,000, in monthly payments of not to exceed 80% of "the estimated value of the work performed on the building," the balance, or final payment, to be made when the work was completed. The work was to be done according to drawings and specifications referred to in the contract, and the payments made upon the certificate of the plaintiff's superintendent. The rights and obligations of the parties are specified in the contract with minute detail, and, among other things, it was stipulated that, in case the contractors failed to perform, the plaintiff might take possession of the work and complete it at the contractors' expense. It is conceded that they failed to perform and that the plaintiff was obliged to complete the work himself at an expense of several thousand dollars more than the contract price. It was agreed between the plaintiff and the contractors that the latter should give to him a bond to insure the faithful performance of the contract, and, in pursuance of this agreement, the defendant, in behalf of the contractors, executed, under seal, and delivered, the instrument upon which this action was brought. It bears date Dec. 27, 1888, and was executed subsequent to the contract, and one of the conditions is that the contractors should well and truly perform the contract referred to, according to its terms, in which case the instrument should be void and of no effect, but that, in case they failed to so perform, the defendant would pay to the plaintiff his damages sustained by reason of such non-performance, not exceeding a sum named. It is conceded that the plaintiff sustained damages by reason of the failure of the contractors to perform their contract, and the recovery is within the limits of the bond. The defense is that the bond was given without consideration, and that the defendant became released from its obligations by reason of changes in and departures from the contract guaranteed, without the defendant's consent, by the parties thereto. At the trial a verdict was directed for the plaintiff.

The plaintiff entered into the contract and bound himself, according to its terms, upon the faith of the promise of the contractors to give the bond, and it is admitted that if this was concurrent with the execution and delivery of the instrument, it would constitute a sufficient consideration. But, since the bond was given afterwards, and, as the defendant claims, subsequent to the time that the contractors had entered upon the actual performance of the contract, it is insisted that it required some new consideration. If it be true that the evidence in the case would warrant a finding by the jury that the contractors were engaged in the performance of the contract when the bond was given, it would also be true that this was by the grace and pleasure of the plaintiff, and not by virtue of any right under the contract. Their right to insist upon performance, as against the plaintiff, and to receive the benefit of the contract, was not perfected until the bond was given. Whatever the contractors may have assumed to do before, it was only upon the delivery of the bond that the contract became complete and binding upon the plaintiff, and hence the mutual obligations imposed upon the contractors at one time, and upon the plaintiff at another, furnished a consideration for the bond. *Bank* v. *Coit*, 104 N. Y. 532, 11 N. E. 54.

The other defense rests mainly upon a construction of the contract which the defendant claims to be the correct one. It should be observed at the outset that the contract guaranteed is, by reference, made a part of the bond, and therefore, in order to determine the scope of the defendant's undertaking, the two instruments must be read together. It is true, as the learned counsel for the defendant contends, that the liability of a surety is *strictissimi juris*. But that does not mean that a different rule must be applied in the construction of contracts of suretyship than that which is to be applied in the construction of contracts in general. Like all other contracts, the undertaking of a surety must be construed fairly and reasonably, and according to the intention of the parties. If the surety has used ambiguous language, and the party secured has advanced his money on the faith of the interpretation most favorable to his rights, that will, ordinarily, prevail, if the instrument is open, reasonably, to such interpretation. It means that a surety shall not be held beyond the precise stipulations of his contract. He is not liable on any implied engagement, where a party contracting for his own interest might be, and he has the right to insist on the strict performance of any condition for which he has stipulated, whethers others would consider it material or not. But where the question is as to the meaning of the written language in which he has contracted, there is no difference, and there ought not to be any, between the contract of a surety and that of any other party. In this respect they are ordinary commercial obligations standing upon the same footing as other contracts. *Gates* v. *McKee*, 13 N. Y. 232; *Bennett* v. *Draper*, 139 N. Y. 266, 34 N. E. 791. When the terms of the contract guaranteed have been changed, or the contract, as finally made, is not the one upon which the surety agreed to become bound, he will be released. *Page* v. *Krekey*, 137 N. Y. 307, 33 N. E. 311. But in this case there is no claim that the terms of the building contract to which the defendant's bond related, have in any respect been changed by the parties to it. The most that is claimed is that, in its performance, the parties have so far departed from its terms as to change the defendant's condition, to her prejudice, and to deprive her of rights and benefits under the contract, which, otherwise, she would be entitled to by subrogation. Where the party secured does some act which changes the position of the surety to his injury or prejudice, the latter is no longer bound. *Phelps* v. *Borland*, 103 N. Y. 406, 9 N. E. 307; *Bank* v. *Streeter*, 106 N. Y. 186, 12 N. E. 706; *Lynch* v. *Reynolds*, 16 Johns. 41: *Brown* v. *Williams*, 4 Wend. 360; *Navigation Co.* v. *Rolt*, 6 C. B. (N. S.) 550; *Calvert* v. *Dock Co.*, 2 Keen 638; *Warre* v. *Calvert*, 7 Adol. & E. 143.

The learned counsel for the defendant insists upon his construction of the contract, that the plaintiff paid or advanced to the contractors a larger portion of the contract price than he was required to by the contract, and that it was paid without any certificate. The contention rests upon the defendant's construction of the building contract, which, in substance, is that the provision for "monthly payments, not to exceed eighty per cent of the estimated value of the work performed on the building," required the estimate to be based only upon the work when actually set in the building, whereas it was in fact based upon the work actually done under or in pursuance of the contract, whether the granite was actually placed in the building or not. This is the alleged departure from the terms of the contract, which constitutes the principal ground of the defense. Before the conclusion of the learned counsel for the defendant can be adopted, we must assent to the premise from which it is sought to be deduced, and that requires us to ascertain and determine the true meaning and intention of the clause of the contract above quoted. It must be given a fair and reasonable construction, and the general situation will throw some light upon the meaning of the written words. It appears that the granite required was to be quarried in Nova Scotia, transported from the quarry to a place in Connecticut, where it was to be dressed, and then transported to New York, and set in the building. The work involved in the preparation and carriage of the material was by far the most expensive part of the contract, and it appears that the contractors had no means to meet this outlay, except the monthly payments, so that if they could realize nothing until the stone was placed in the building, they would be practically unable to perform the contract at all. This would be an unreasonable construction, and would, if acted upon, operate so oppressively as to place the contractors at the mercy of the owner, a view that is always to be avoided when possible. *Russell* v. *Allerton,* 108 N. Y. 292, 15 N. E. 391. It would deprive them of all right to monthly payments except when and to the extent the granite had actually been placed in the walls, however large their outlay for procuring and preparing the material may have been during the month. The parties had the right to give to the expression "work performed on the building" a broader meaning, which could very properly include the value of any work done or materials procured under the contract toward its erection, although the granite procured and prepared had not yet been placed. Since no payments were made in excess of 80% of the value of the work performed in setting the stone, and in procuring and preparing them, and as all the material so procured and prepared actually went into the building, no advances were made by the plaintiff to the contractors beyond the fair requirements of the contract. It is said that it cannot be supposed that the plaintiff contracted to pay any part of the contract price for material at the quarry, and at the place where it was to be prepared, or for the work performed in preparing the same for use, before it could be known that it would ever actually reach the building. But since the monthly payments were stipulated for the purpose of enabling the contractors to prosecute the work, and as the operation of placing the granite in place when prepared was the least part of it, we do not think that this view would be unreasonable or improbable. It gave to the plaintiff reasonable assurance and protection against loss, and at the same time enabled the contractors to prosecute the work. While the plaintiff is described in the contract as owner, he in fact had no interest whatever in the building, but was the general and immediate contractor from the city for the erection of the whole building, and the defendant's principles were his sub-contractors for a particular and specific part of the work, namely, the granite work. The plaintiff was not entitled to his contract price from the city until the building was completed, though the officers representing it had discretion to make advances. Moreover, by a clause in the contract, the plaintiff, in case the subcontractors abandoned the work or failed to perform, could terminate the contract and go on with the work himself, and in that event the material in process of preparation should belong to him for the purpose of completing the work, whether such material was at the building, at the quarry, or at some other place. So that the plaintiff, in stipulating for monthly payments, estimated upon the work actually performed, whether in the building or not, assumed nothing more than the ordinary and usual risks incident to all contracts of that character. We do not think, therefore, that the meaning of the contract should be made to depend upon the use of the words, "on the building," when we can see, from the situation of the parties, the nature of the work and other provisions of the instrument, that the intention was to make the advances as the work progressed. To give to it the other construction would, in practice, disable the contractors at the very outset from performance, and impose upon the defendant a liability, inevitable from the beginning, and possibly in a much larger amount than has followed the construction adopted by the parties themselves.

The objection that the payments were made without the certificate may be answered in the same way. The owner could dispense with it if he so elected, under the terms of the contract, if not upon general principles, and since the payments made without it were not greater in amount than, upon the true construction of the contract, they should have been if it had been exacted, the omission of the owner to insist upon it did not prejudice the surety. We are not dealing, now, with any actual change in the terms of the contract, but with acts or omissions of the plaintiff in the performance, which, in order to operate to release the surety, must be of such a character that it can be said that her position was changed to her prejudice. It should also be observed that there is a clause in the contract the material part of which reads as follows: "Should the owner, at any time during the progress of said work, request any alterations, deviations, additions or omissions from the said contract, he shall be at liberty to do so, and the same shall in no way affect or make void the contract." The defendant, having, by reference, in effect made the contract a part of the bond, must be deemed to have assented to this provision, and to any changes or deviations in performance from the building contract made under it. She has, in effect, guaranteed the performance of a written contract between other parties, which, by its terms, permitted the parties to change it or deviate from it. While it is not important to consider the real scope of this clause, since we prefer to dispose of the questions in the case upon the ground that there was no material departure from the contract, when properly construed, it should be noted that she consented in advance to changes of some character which are permitted by the contract in language quite broad and comprehensive. It would not be difficult to show that the plaintiff might, under this provision at least, dispense with the formality of a certificate when called upon by the contractors, from time to time, for some portion of the contract price, without discharging the surety, even though it was more important to the defendant's interest and protection than it appears to be. It is manifest that the provision was intended for the benefit of the owner alone, and he could waive it without affecting the defendant's liability.

The contractors having failed to complete the work, the plaintiff gave the notice required by the contract in order to terminate it. The contract provides when and upon what contingencies the plaintiff could terminate, and the manner of proceeding for that purpose. The final act which was to put an end to the contract was taking possession of the premises by the plaintiff. The notice may have been a necessary step or formality in that direction, but, of itself, it did not operate to bring the contract to an end. It was clearly within the power of the plaintiff to recall it, after given, if not upon general principles, then under the permission contained in the contract. It appears that he was induced, subsequently, to allow the contractors to go on, and they again attempted to complete the work, and again failed. It is said that the loss which the plaintiff sustained, and for which the recovery was had, occurred under this permission, and the defendant's counsel treats this last effort at performance as a new contract in regard to which the surety was not bound. It was manifestly nothing more than a mere waiver or recall of the notice for the termination of the contract, and the work was performed and payment made, not upon a new contract, but upon the old one, up to the time that the final notice was given, when the plaintiff was obliged to take possession of the work. The case was very fully considered in the court below, and, as we have sufficiently indicated the ground of our concurrence in the decision upon points that are controlling, it is unnecessary to notice other and minor questions in the case. The judgment should therefore be affirmed, with costs. All concur.

Judgment affirmed.

BALLARD *vs.* BURTON (1892).

64 Vt. 387; 16 L. R. A. 664, 24 Atl. 769.

Exceptions by defendant to rulings of the Franklin County Court made during the trial of an action brought to enforce the alleged liability of defendant for the amount of a certificate of deposit which he had indorsed, which resulted in a judgment in favor of plaintiff. Judgment reversed.

The certificate of deposit which constituted the foundation for the cause of action was as follows:

"No. 3483.

FIRST NATIONAL BANK OF ST. ALBANS, ST. ALBANS, VT., Jan. 14, 1884.

I hereby certify that Joseph Ballard has this day deposited in this bank nine hundred sixty-two dollars, payable to the order of himself on return of this certificate properly indorsed, with interest at 4 per cent per annum.

(Signed) A. SOWLES."

and on the back thereof,

E. A. SOWLES, A. SOWLES, O. A. BURTON, Surety.

Messrs. *Farrington & Post*, and *Wilson & Hall*, for defendant.

H. C. Adams and *Ballard & Burleton*, for plaintiff.

START, J., delivered the opinion of the court:

The defendant's motion for a verdict was properly overruled. It appears from testimony, not controverted, that the defendant was a stockholder and a director of the First National Bank of St. Albans. The plaintiff and his sister had money deposited there, evidenced by certificates of deposit. There was a run on the bank, and the plaintiff presented these certificates, and demanded the money evidenced by them. There was a sufficient amount of money at hand to pay the sums demanded; but the officers of the bank desired to retain it, and asked the plaintiff to leave it. Thereupon he told them he would accept of a new certificate signed by the defendant; otherwise he wanted the money. They gave him such a certificate, and he surrendered up to the bank the old certificates. The plaintiff subsequently paid his sister the amount of her certificate, which was included in the new certificate. The cashier of the bank understood the plaintiff was to forbear for a reasonable time the exercise of his right to draw his money, and the plaintiff did forbear until the bank closed its doors, and its funds went into the hands of a receiver. At this time the bank was insolvent. The evidence fails to show that a definite period of forbearance was agreed upon, but no question is made but that the plaintiff did forbear for a reasonable time. The uncontroverted evidence clearly entitled the plaintiff to a holding by the court that there was a sufficient consideration for the defendant's promise. The request by the officers of the bank that the plaintiff leave the money, his reply, the giving of a new certificate, the surrender of the old ones, and the forbearance of the plaintiff admit of but one interpretation. The plaintiff, in consideration of a new certificate signed by the defendant, surrendered the old certificates, and agreed to and did forbear the exercise of a legal right to then draw his own and his sister's money. In view of the uncontroverted facts and circumstances in the case, any other construction of the contract would be meaningless. It is a rule, in construing contracts, that they are to be so understood as to have a legal and actual operation; and a construction which would be senseless, in view of the circumstances of the case, or wholly inapplicable, should never be adopted. Story, Cont. § 640; *Atwood* v. *Cobb*, 16 Pick. 227; 26 Am. Dec. 657; *Evans* v. *Sanders*, 8 Port. (Ala.) 497, 33 Am. Dec. 297.

Words are not to be construed in a frivolous or ineffectual sense, when a contrary exposition can be given them. They should have a reasonable construction, according to the intent of the parties. Chitty, Cont. 79. In *Gunnison* v. *Bancroft*, 11 Vt. 490, it is held that language used by one party to a contract is to receive such a construction as he at the time supposed the other party would give to it, or such a construction as the other party was fairly justified in giving to it. In *Judevine* v. *Goodrich*, 35 Vt. 19, where one, in reply to the request of another for a license to do something in respect to the former's property, did not intend to accede to the request, but purposely used language susceptible of a double interpretation in this respect, with the intention that the other party should derive the impression that he did accede to the request, and the other did derive such impression and relied on it, it was held that he was bound to the same extent as if he had, in express words, granted the license. When the plaintiff said to the officers of the bank, in reply to their requests that he leave the money, that he would accept a new certificate signed by the defendant, otherwise he wanted his money, they had the right to understand him as offering to leave the money for a reasonable time if such a certificate were furnished. They accepted of his offer, furnished the certificate, he accepted of it, and forbore for a reasonable time the exercise of his right to draw the money. All parties seemed to have understood that such was his undertaking, and what was said and done admits of no other interpretation, and such will be deemed to have been the contract.

It is insisted that the defendant's promise was without consideration, because no time of forbearance was agreed upon. A promise to forbear and give further time for the payment of a debt, although no certain or definite time be named, if followed by an actual forbearance for a reasonable time, is a valid and sufficient consideration for a promise to pay the debt by a person other than the debtor. *King* v. *Upton,* 4 Me. 387, 16 Am. Dec. 266; *Elton* v. *Johnson,* 16 Conn. 253; *Howe* v. *Taggart,* 133 Mass. 284; *Prouty* v. *Wilson,* 123 Mass. 297; *Robinson* v. *Gould,* 11 Cush. 55; *Moore* v. *McKenney,* 83 Me. 80. In *Howe* v. *Taggart, supra,* FIELD, J., in delivering the opinion of the court, says: "It seems to have been assumed in this commonwealth that an agreement to forbear bringing suit for a debt due, even although for an indefinite time, and even although it cannot be construed to be an agreement for perpetual forbearance, if followed by actual forbearance for a reasonable time, is a good consideration for a promise." In *Moore* v. *McKenney, supra,* decided by the Supreme Court of Maine in 1890, the defendant wrote his name upon the back of the note declared upon, intending thereby to guarantee its payment. He did this in consideration of the plaintiff's promise to forbear and give further time for the payment of the note; no time of forbearance was agreed upon, and it was held that the court properly ordered a verdict for the plaintiff. Walton, J., in delivering the opinion of the court, says: "If the promise is in general terms, no particular time being named, the law implies that the forbearance shall be for a reasonable time. Such is the legal construction of such a promise. The debtor, therefore, by such promise, does obtain a right, not only to some delay, but to a reasonable delay; such as, under all the circumstances, he is reasonably entitled to." In *King* v. *Upton, supra,* the promise counted on was to pay the debt of another, in consideration that the creditor would "forbear and give further time for the payment of the debt," naming no time. The plaintiff averred that he did thereupon forbear, and the consideration was held sufficient. In *Calkins* v. *Chandler,* 36 Mich. 320, 24 Am. Rep. 593, it is held that an agreement to pay the debt of another in consideration that the creditor would forbear and give further time for payment is founded upon a good consideration, although no definite time of forbearance is named. In *Hakes* v. *Hotchkiss,* 23 Vt. 235, it is said: "If no agreement be made as to the length of time during which the promisee will forbear, the law will presume that he undertakes to forbear for a reasonable time, and this is sufficiently certain, and is a good consideration." Parsons in his work on Contracts (vol. 1, p. 442), says: "Nor need the agreement to delay be for a time certain, for it may be for a reasonable time only, and yet be sufficient consideration for a promise."

The Revised Statutes of the United States (sec. 5242, relating to banks) provide, among other things, that all payments of money made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner provided in that chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void. It is insisted by the defendant that a payment by the bank at the time the plaintiff called for his money would have been void under this provision of the statute; that the plaintiff lost nothing by his agreement and forbearance; and that neither the bank nor the defendant were benefitted thereby. Notwithstanding this statute and the insolvency of the bank, the plaintiff waived a legal right in consideration of the defendant's promise. Before he agreed to forbear, the certificates were not subject to any defense, and he could have negotiated them, and they would have been payable on presentation at the bank. By surrendering them, and taking a new certificate impaired by this agreement to forbear, he made his claim subject to a defense that would be likely to affect its negotiability and value. Had the plaintiff drawn his money, it is not certain that the receiver would have called for it, or that he would have recovered it by an action. A determination of the receiver's right to the money might necessitate a trial of doubtful issues of law and fact. The plaintiff had a right to draw, and to try and hold the money. He waived this right in consideration of the defendant's promise. But for this promise he would have drawn his money January 14, 1884. The receiver was not appointed until some three months thereafter, during which time no one could have rightfully called on him for the money; and during this time, at least, he waived his right to have and enjoy his money. He may, or may not, have been damaged by waiving these rights. He waived them in consideration of the defendant's promise, and that is sufficient.

Consideration does not necessarily depend upon whether the thing promised results in a benefit to the promisee, or a detriment to the promisor. It is enough that something is promised, or the exercise of a present right is forborne. In Anson, on Contracts, p. 62, it is said: "Courts will not inquire whether the thing which forms the consideration does, in fact, benefit the promisee or a third party or is of any benefit to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made, as a consideration for the promise made to him." The law will not enter into an inquiry as to the adequacy of the consideration for a promise, but will leave the parties to be the sole judges of the benefits to be derived therefrom, unless the inadequacy of the consideration is so gross as of itself to prove fraud or imposition. *Judy* v. *Louderman*, 48 Ohio St. 562. In general a waiver of any legal right, at the request of another party, is a sufficient consideration for a promise. 1 Parsons, Cont., p. 444. Any damage or suspension or forbearance of a right will be sufficient to sustain a promise. 2 Kent, Com. 12th ed., p. 465. In *Burr* v. *Wilcox*, 13 Allen, 273, WELLS, J., in defining "considerations," says: "Any act done at the defendant's request, and for his convenience, or to the inconvenience of the plaintiff, would be sufficient." The exchequer chamber, in 1875, defined "consideration" as follows: "A valuable consideration in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Any act done by the promisee at the request of the promisor, however trifling the loss to himself or the benefit to the promisor, is a sufficient consideration for a promise made without fraud, and with full knowledge of all the circumstances. *Doyle* v. *Dixon*, 97 Mass. 213, 93 Am. Dec. 80. Pollock, in his work on Contracts, p. 166, says: "Consideration means, not so much that one party is profiting, as that the other abandons some legal right in the present." In *Boyd* v. *Frieze*, 5 Gray 554, Shaw, Ch. J., says: "An agreement, therefore, to forego one's legal right, or forbear collecting a debt, or enforcing any other beneficial right, is a good consideration for an express promise made upon it. Such agreement may be expressed or implied by law."

There was evidence tending to show that the defendant was a maker of the certificate, and, if such maker, his undertaking was to pay the plaintiff the amount called for by the certificate when it, properly indorsed, should be returned to the bank. The bank having been closed, and a receiver appointed, a return of the certificate, properly indorsed, to the receiver, was all that was required. No other demand or notice was necessary before bringing suit. There were no officers of the bank to whom the certificate could be returned. The funds of the bank were in the hands of the receiver, and, for the purpose of returning the certificate as therein provided, the receiver was the bank. The plaintiff was allowed to testify that he would not have left his money in the bank if he had not understood that the defendant was obligated to pay it. The plaintiff was allowed to testify, without objection, that he went to the bank for the purpose of drawing his money; and there was no error in allowing him to state that he would have done what he proposed to do, but for the defendant's promise. The defendant requested the court to instruct the jury "that if Albert Sowles and Edward S. Sowles signed the certificate as indorsers, with the right of demand and notice, then, under the testimony, the defendant is not liable. We think from the testimony, that, if Albert and Edward A. Sowles were indorsers, then the defendant was an indorser; but the necessity for such instruction was obviated by the instruction that, if the jury found that the defendant was an indorser, then the plaintiff could not recover, and it was not error to decline to give the instruction requested. Whatever may have been the relation of the signers of the certificate to each other, they were for the purpose of determining their liability to the plaintiff, either makers or indorsers of the certificate. The evidence showing the understanding between the signers of the certificate as to their respective liability to the plaintiff, and as between each other, was not withdrawn from the consideration of the jury, and it was for them to say, from all the evidence, whether the undertaking of the defendant was that of a maker or that of an indorser. The court told the jury that, if nothing was said to the plaintiff to explain to him that their obligation on the certificate was that of indorsers, and not makers, he had the right to understand that they were makers and absolutely liable upon it. It is insisted by counsel for the defendant that the affixing of the word "surety" to the defendant's name was notice to the plaintiff that the defendant intended to limit and restrict his liability, and that this fact should overcome the presumption of law laid down by the court. The word "surety," affixed to the defendant's name, only indicated to the plaintiff the fact that the defendant was surety for the bank, and this was already known to him. He knew that the bank had the money; that the defendants E. A. Sowles and A. Sowles did not have it; and that, in fact, they were sureties for the bank; but this fact did not change the undertaking of the defendant from that of a maker to that of an indorser entitled to demand and notice. A surety is an original maker, and becomes primarily and absolutely liable, as much so as the principal, to any person lawfully holding the paper. *Bank of Newbury* v. *Richards,* 35 Vt. 284. The defendant was liable, *prima facie*, as a maker of the certificate. *National Bank of Bellows Falls* v. *Dorset Marble Co.*, 61 Vt. 106, 2 L. R. A. 428; *Strong* v. *Rikers,* 16 Vt. 554. But this presumption was susceptible of being controlled by evidence of the real obligation intended to be assumed by the defendant, and known to the plaintiff. The court made a proper application of this rule in admitting evidence as to what transpired before and at the time of the execution of the certificate of deposit, as affecting the liability of the defendant, and told the jury that, if they found that the defendant was an indorser, then the plaintiff could not recover. To justify the verdict returned by the jury, they must have found that the defendant's undertaking was that of a maker of the certificate. The court told the jury that, if the defendant put his name upon the certificate for the purpose of stopping a run on the bank and tiding it over its then exigency, this would be a sufficient consideration. If this was not the true test of consideration, the defendant has no reason to complain. It was not necessary that he receive a consideration. As the evidence stood, the question as to whether he received a consideration was an immaterial issue, and the defendant was not prejudiced by the court's submitting such issue to the jury. It appeared from the undisputed facts that his principal received a sufficient consideration to support his promise. This was all that was required. *Moore* v. *McKenney, King* v. *Upton* and *Howe* v. *Taggart, supra.* The court might have properly held that a sufficient consideration was established by the uncontradicted facts, and withheld this question from the consideration of the jury. The plaintiff concedes that there was error in the *pro formâ* ruling of the court upon the question of interest, and offers to remit the excess of interest included in the judgment rendered in the county court.

Judgment reversed.

Judgment for the plaintiff to recover $962, with interest to be computed at the rate of 4 per cent per annum from the date of the certificate to the date of the writ, and 6 per cent thereafter, and his costs in the county court, less the dividends paid on the certificate by the receiver, and the defendant's costs in this court.

TAFT, J. On the 14th of January, 1884, the bank was hopelessly insolvent and the plaintiff had no right to withdraw his money. I, therefore, while not dissenting, doubt on the subject of consideration.

DAVIS SEWING MACHINE COMPANY *vs.* RICHARDS et. al. (1885).

115 U. S. 524; L. Ed'n Book 29, 480.

In error to the Supreme Court of the District of Columbia.

Mr. *James G. Payne*, for plaintiff in error.

Mr. *W. A. Cook* and Mr. *C. C. Cole*, for defendants in error.

GRAY, J. This was an action, brought in the Supreme Court of the District of Columbia, upon a guaranty of the performance by one John W. Poler of a contract under seal, dated December 17, 1872, between him and the plaintiff corporation, by which it was agreed that all sales of sewing machines which the corporation should make to him should be upon certain terms and conditions, the principal of which were that Poler should use all reasonable efforts to introduce, supply and sell the machines of the corporation, at not less than its regular retail prices, throughout the District of Columbia and the Counties of Prince George and Montgomery, in the State of Maryland, and should pay all indebtedness by account, note, indorsement or otherwise, which should arise from him to the corporation under the contract, and should not engage in the sale of sewing machines of any other manufacture; and that the corporation, during the continuance of the agency, should sell its machines to him at a certain discount, and receive payment therefor in a certain manner; and that either party might terminate the agency at pleasure.

The guaranty was upon the same paper with the above contract, and was as follows:

> "For value received, we hereby guarantee to the Davis Sewing Machine Company, of Watertown, New York, the full performance of the foregoing contract on the part of John W. Poler, and the payment by said John W. Poler of all indebtedness, by account, note, indorsement of notes (including renewals and extensions) or otherwise, to the said Davis

Sewing Machine Company, for property sold to said John W. Poler, under this contract, to the amount of Three Thousand ($3,000) Dollars.

"Dated Washington, D. C., this 17th day of December, 1872.

"A. Rothwell.
"A. C. Richards."

Under the guaranty were these words: "I consider the above sureties entirely responsible. Washington, Dec. 19, 1872. J. T. Stevens."

At the trial the above papers, signed by the parties, were given in evidence by the plaintiff, and there was proof of the following facts: On December 17, 1872, at Washington, the contract was executed by Poler, and the guaranty was signed by the defendants, and the contract and guaranty, after being so signed, were delivered by the defendants to Poler, and by Poler to Stevens, the plaintiff's attorney, and by Stevens afterwards forwarded, with his recommendation of the sureties, to the plaintiff at Watertown in the State of New York, and the contract there executed by the plaintiff. The plaintiff afterwards delivered goods to Poler under the contract, and he did not pay for them. The defendants had no notice of the plaintiff's execution of the contract, or acceptance of the guaranty, and no notice or knowledge that the plaintiff had furnished any goods to Poler under the contract or upon the faith of the guaranty, until January, 1875, when payment therefor was demanded by the plaintiff of the defendants and refused. At the time of the signing of the guaranty, the plaintiff had furnished no goods to Poler, and the negotiations then pending between the plaintiff and Poler related to prospective transactions between them.

The court instructed the jury as follows: "It appearing, at the time the defendants signed the guaranty on the back of the contract between plaintiff and Poler, the plaintiff had not executed the contract or assented thereto, and that the contract and guaranty related to prospective dealings between the plaintiff and Poler, and that subsequently to the signing thereof by the defendants the attorney for the plaintiffs approved the responsibility of the guarantors and sent the contract to Watertown, New York, to the plaintiff, which subsequently signed it, and no notice having been given by the plaintiff to the defendants of the acceptance of such contract and guaranty, and that it intended to furnish goods thereon and hold the defendants responsible, the plaintiff cannot recover, and the jury should find for the defendants."

A verdict was returned for the defendants, and judgment rendered thereon, which on exceptions by the plaintiff was affirmed at the General Term, and the plaintiff sued out this writ of error, pending which one of the defendants died and his executor was summoned in.

The decision of this case depends upon the application of the rules of law stated in the opinion in the recent case of *Davis* v. *Wells*, 104 U. S. 159, in which the earlier decisions of this court upon the subject are reviewed.

Those rules may be summed up as follows: A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreemen to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract.

The case at bar belongs to the latter class. There is no evidence of any request from the plaintiff corporation to the guarantors or of any consideration moving from it and received or acknowledged by them at the time of their signing the guaranty. The general words at the beginning of a guaranty, "value received," without stating from whom, are quite as consistent with a consideration received by the guarantor from the principal debtor only. The certificate of the sufficiency of the guarantors, written by the plaintiff's attorney under the guaranty, bears date two days later than the guaranty itself. The plaintiff's original contract with the principal debtor was not executed by the plaintiff until after that. The guarantors had no notice that their sufficiency had been approved, or that their guaranty had been accepted, or even that the original contract had been executed or assented to by the plaintiff, until long afterward, when payment was demanded of them for goods supplied by the plaintiff to the principal debtor.

Judgment affirmed.

GANO *vs.* FARMERS' BANK OF KENTUCKY AT GEORGETOWN (1898)

103 Ky. 508; 45 S. W. 519.

Appeal from Circuit Court, Scott county.

Jas. T. Kelly and *Geo. E. Prewitt*, for appellant.

Owens & Finnell, for appellee.

HAZELRIGG, J. The appellant, Gano, and nine others executed a writing to the end that one P. T. Pullen might obtain the sum of $10,000 with which to run a milling business in Georgetown, Kentucky. The appellee bank, on the strength of this writing, furnished $5,000, which was used to pay off a debt then owing the bank by Pullen, and also $5,000 which was used in the business. After a time, Pullen being insolvent, the bank called on the obligors in the writing for a discharge of their undertaking. All seemed to have paid their respective shares demanded by the writing, except the appellant, who tendered certain issues of law and fact in defense of the action which followed his refusal to pay his share. The writing which forms the basis of action is as follows:

"P. T. Pullen, of Georgetown, Kentucky, contemplating the leasing of the Thompson mills, and carrying on the milling business, and being in need of capital with which to buy stock and run the same as it should be run successfully: Now, in order to aid him, we, W. E. Pullen, George Carley, George V. Payne, T. T. Hedger, J. M. Penn, James W. Craig, Buford Hall, Daniel Gano, S. B. Triplett, and Warren C. Graves, whose names are hereto signed, agree to become his surety to an amount not exceeding ten thousand dollars in the aggregate. After this instrument of writing had been signed by all of us (ten in number), it may be used by the said P. T. Pullen in the nature of a collateral for a sum or sums not exceeding ten thousand dollars in the aggregate, and we, the said signers, shall be bound jointly and severally as sureties upon any note or notes not exceeding in the aggregate said sum to which said Pullen shall sign his name and deposit this as collateral. In case the money is borrowed of more than one party, the lenders can agree upon who shall hold this writing for the benefit of all. Said Pullen agrees to mortgage all property he now has to us in order to secure us by virtue of obligations assumed in this instrument, and renew said mortgage from time to time when required, upon any and all property he may have. This instrument of writing to continue in force for three years from the first day of July, 1891, and no longer, and if at any time any one or more of the signers hereto should die or become insolvent, said Pullen is to either pay off his or their portion of the money that may be borrowed, or furnish other good and solvent surety or sureties in his or their stead. Said Pullen agrees to keep all grain and flour he may have on hand insured in some good insurance company for the benefit of the signers hereto, and his books are at all times to be open to the inspection of any one or all of the said signers, either in person or by an expert of their selection. Given under our hands this 15th day of July, 1891.

(Signed) George V. Payne,"
And others named in the writing.

The paper, as we have already indicated, was taken by Pullen to the appellee, to whom Pullen was then indebted in the sum of $5,000, evidenced by Pullen's note with his brother as surety. A new note was then executed to the bank for $5,000, and this note was then discounted by the bank, and the proceeds taken to pay off this pre-existing debt. It is therefore insisted for the appellant that the principle announced in *Russell* v. *Ballard,* 16 B. Mon. 205, is applicable here and, when applied, the surety stands discharged. It was there said: "If a note be purchased by a party, with notice that one of the obligors is surety merely, and that the sale and purchase will defeat the purpose for which it was executed by him, or will violate any understanding or agreement between him and his principal, then the purchaser will be affected by such notice, and cannot hold the surety liable on the note to compel him to pay it." Here the bank had notice that Gano was surety merely on the writing taken as collateral by the bank to secure the new note, and it had notice that the sale and purchase of this new note and application of its proceeds to pay off the old debt would defeat the sole purpose for which the writing was executed by the surety, namely, "to raise the sum of ten thousand dollars, buy stock and run the same." This would seem sufficient to bring the case within the principle announced in the cited case, for it is manifest that, if one-half the capital needed to carry on the milling business and "run the same successfully" was to be taken to pay off an old debt, the business must suffer, and likely not be run successfully. But this is not all. The bank had notice that the sureties looked to the property which this money—all of it—would buy as an indemnity by way of mortgage; and by whatever amount the actual cash furnished Pullen for his business was lessened, by that amount the value of their indemnity would be lessened. This is also in line with the general doctrine so often announced by the textwriter and by this court for the protection of sureties. We might assume without proof—but the evidence is conclusive on the point—that appellant would not have entered into this contract had it been disclosed to him that this "letter of credit", as the writing may be termed, was to be used to pay off the large debt due the bank, and therefore it was incumbent on the bank to disclose to the surety all the facts material to the risk before it could divert the fund intended to be raised by the collateral to purposes of its own. The rule is thus stated by Mr. Story in his Equity Jurisprudence: "The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any expressed or implied misrepresentation of facts, or any undue advantage taken of a surety by his creditor, either by surprise or by withholding proper information, will undoubtedly permit sufficient grounds to invalidate the contract." Section 324. And further: "Thus if a party taking a guaranty from a surety conceals from him facts which increase his risk, and suffers him to enter into the contract under false impressions as to the real state of facts, such concealment will amount to a fraud, because the party is bound to make the disclosure, and the omission to make it under such circumstances is equivalent to an affirmation that the facts do not exist." Sections 214, 215. See *Com.* v. *Berry,* 95 Ky. 443, 26 S. W. 7, and cases cited. Other obligors, who lived in or about Georgetown, the scene of this transaction, seem either to have had knowledge of these material facts at the time, or obtained it shortly afterwards, and, having that knowledge, still paid off their shares; but the appellant was an old man, some 85 years of age, living quite a distance from the town, and visiting there only a few times within a year. There is no doubt of his entire ignorance of the material facts indicated. He was not even apprised of the fact that the writing had been used by Pullen with the bank or anyone else, and money obtained thereby. It seems to be clear that he was entitled to this notice. He had merely offered his name with that of others as surety to whomsoever might accept the offer and loan of money. He was therefore entitled to notice of acceptance. In *Steadman* v. *Guthrie,* 4 Metc. (Ky.) 148, it was held that: "When the offer is to guaranty a debt for which another is primarily liable in consideration of some act to be performed by the creditor, mere performance of the act is not sufficient to fix the liability of the guarantor; but the creditor must notify the guarantor of his acceptance of the offer or of his intention to act upon it." That the guarantor might, by inquiry from the person in whose favor the guaranty was given, have learned what had passed between the guarantees and himself, does not dispense with notice. A person thus proposing to become surety for another is not bound to inquire as to the acceptance of his proposal. The creditor who intends to hold him responsible for the debt of another must show reasonable notice of such intention. See, also, *Kincheloe* v. *Holmes*, 7 B. Mon. 5; *Lowe* v. *Beckwith*, 14 B. Mon. 189; *Thompson* v. *Glover*, 78 Ky. 195. It is true in this case that the record does not show that the bank's old debt on Pullen was in danger of being lost. It was secured by the brother of the debtor, who was solvent, although his property was in the main covered by mortgages, and he was already indebted to the bank in a considerable sum. Still it may be said he was solvent. We think this, however, makes no difference. It may show more conclusively—what is already apparent enough—that there was no actual fraud intended by the bank, or any of its officers, in the transaction; but this does not change the legal status of the parties on the point involved. It further appears that the brother of the principal debtor, who was surety on an old debt, had a mortgage on certain stock and property belonging to the debtor to indemnify him in his suretyship; and this was released, and a mortgage taken in favor of the obligors in the writing in question. But it further appears that the value of this property was quite insignificant, and that appellant had no knowledge even that this had been done. The writing, the contents of which the bank had notice of, because they accepted and acted on it, entitled the obligors to have a mortgage on all the property the debtor had or might acquire; and we do not see that, because one was in fact executed of which no notice whatever was given to the appellant, this can take the place of the notice to which we have said appellant was entitled when his offer was accepted and acted on by the bank. Actual notice is what the law requires, and notice or knowledge of this new mortgage might have been sufficient, but this the appellant did not have. We think the plaintiff's petition should have been dismissed, and the judgment is reversed for proceedings consistent with this opinion.

GIBBS ET AL. *vs.* BLANCHARD (1867).

15 Mich. 292.

The facts and the exceptions to the rulings and the charge of the court are stated in the opinion.

M. J. Smiley, for plaintiff in error.

H. F. Severens, for defendant in error.

CHRISTINACY, J. The main question in this case is whether the promise of Gibbs (one of the defendants below) comes within the second clause of the second section of our statute of frauds, as a "special promise to answer for the debt, default, or misdoings" of Daily, the other defendant.

The declaration contains a special count upon the contract, and the common counts for goods sold and delivered. The special count sets forth that, "in consideration that said plaintiff agreed to sell to the said Daily a certain horse which the plaintiff then and there had, of the value of sixty dollars, undertook and promised the said plaintiff to make, sign and deliver their promissory note to said plaintiff or bearer, in the sum of sixty dollars, for the purchase price of said horse, which said promissory note was to be payable thereafter, in six months from date." It further alleges that the plaintiff, relying upon said promise of said defendants, and in consideration thereof, did sell and deliver the horse to said John Daily, for the price of sixty dollars. The breach alleges the failure and refusal to make and deliver the note, as well as the refusal to pay the money.

It was clear, from the evidence, that the horse was bought for the benefit of, and delivered to Daily, and that the plaintiff would not have sold the horse on the credit of Daily alone. But upon the question, whether Daily and Gibbs were to give a joint note, or whether the latter was only to indorse the note of the former, or to become his guarantor, the evidence was conflicting.

There was evidence from which the jury might have found a joint promise, or, in other words, a promise by both to execute and deliver to the plaintiff a joint note for the price; and from the circumstances and subsequent acts of the parties, the jury might have been authorized to find that the note was to be made payable in six months, though they might also have found that no particular time was mentioned or expressly agreed upon for which the note was to run.

The evidence tending to show that the promise was joint, or that a joint note was to be given, was substantially this: Gibbs and Daily called upon the plaintiff together, and Gibbs asked plaintiff if he wanted to sell his mare. Plaintiff said he did. Gibbs inquired the price, and being told sixty dollars, wanted to know if plaintiff would take Daily's note if he, Gibbs, would sign it and see it paid; to this plaintiff assented. The mare not being present, and Gibbs, being anxious to get home, said Daily might go with plaintiff and see the mare, and if the mare suited him he might fetch her back with him and draw up a note and Daily might sign it, and the first time he, Gibbs, went to town he would sign it. The mare was delivered to Daily, who signed a note for it at six months, which was afterwards endorsed by Gibbs on Sunday. This note was produced on the trial and tendered back to defendants.

The court charged the jury that "if it was the understanding of the parties that Daily was the purchaser, and that he should give his note to the plaintiff for the price, and that Gibbs should so sign as only to be liable as indorser, the plaintiff must fail. If however, the understanding of the parties was, at the time, that Gibbs and Daily were the buyers of the mare, and that both were to be liable as purchasers for the purchase price, and, accordingly, should become joint makers of a promissory note for its payment, though Daily was less relied upon by the plaintiff than Gibbs, and though, in point of fact, it was understood that the mare, when bought, should belong to Daily, the plaintiff is entitled to recover. That the principle in this class of cases is, that if the agreement be such that two persons, in the purchase of goods, do at the same time become co-debtors to the seller for the price, then both are purchasers, and the case is not within the statute of frauds, and no memorandum in writing is necessary. But if it be such that one, at the time, becomes debtor to the seller, and the other security only for the debt, it is within the statute of frauds, and the undertaking of the security is void unless a memorandum of it in writing is made."

Though the question is one requiring some accuracy of discrimination, I have come to the conclusion, after a careful examination of the authorities, that the charge of the court was not only correct, but that it expresses the true rule of law applicable to the question with remarkable clearness.

No question can arise as to the sufficiency of the consideration for the undertaking of Gibbs, whether original or collateral, within or without the statute. Without his promise, the plaintiff would not have parted with his property. The consideration, therefore, is equally as good in law as a sale of the horse to him alone would have been for his sole promise to pay the price.

The plain ordinary meaning of the language used in this clause of the statute would seem sufficiently to indicate that the class of special promises required to be in writing includes only such as are secondary or collateral to, or in aid of the undertaking or liability of some other party whose obligation, as between the promisor and promisee, is original or primary. If there be no such original or primary undertaking or liability of another party, there is nothing to which the promise in question can be secondary or collateral, and the promise is, therefore, original in its nature, and not within the statute. In other words, the statute applies only to promises which are in the nature of guaranties for some original or primary obligations to be performed by another. This has been settled by a remarkably uniform course of decision since the passage of the statute (29 Car. II., ch. 3, Sec. 4), which does not essentially differ from our own and those of most of the states of the Union. So numerous and so uniform have been the decisions upon this point, that it would savor of affectation to cite them. They will be found cited in most of the elementary treatises: See Browne on Stat. Frauds, ch. 10; Chitty on Cont., p. 442, et seq.; 2 Pars. on Cont., 4th ed., 301. And though the terms *original* and *collateral* have been criticised, yet when used, the one to mark the obligation of the principal debtor, the other that of the person who undertakes to answer for such debt, they are strictly correct, and give the true view of this clause of the statute: *Mallory* v. *Gillett,* 21 N. Y. 412, 414; Browne on Stat. Frauds, ch. 10, Sec. 192.

As a result of this principle, that one must be held originally or primarily, and the other only collaterally, or in default of the former it follows that the statute only applies to such promises made in behalf or for the benefit of another, as would, if valid, create a distinct and several liability of the party thus promising, and not a joint liability with the party in whose behalf it is made. For if one be bound in the first instance and at all events, and the other only contingently, or on default of the first, the liability could not be joint. On the other hand, if the promise or the obligation of the two be joint, as between them, on the one side and the promisee on the other, then neither is collateral to the other, and such joint promise is original as to both. Hence it has been held in England that an agreement to convert a separate into a joint debt is not within the statute; the effect being to create a new debt, in consideration of the former being extinguished: Ex parte Lane, 1 De Gex. 300; Browne on Stat. of Frauds. 193.

Where the question arises (as it has in almost all the cases) as one of the several liability of the party promising in behalf of another (as for the price of goods sold to another), the true rule undoubtedly is, that if the latter (to whom the goods are sold) be liable at all, then the promise of the former is collateral, and must be in writing; because, from the very nature of such a case, the party to whom the goods are sold, and in whose behalf the promise is made, is the principal debtor, and because it would be manifestly unreasonable to hold that both were in such cases *severally* liable as principals, as upon several original undertakings at the same moment. See *Hetfield et al.* v. *Dow*, 3 Dutcher, 440; *Dixon* v. *Frazee*, 1 E. D. Smith, 32. And this rule applies equally when the promise is made in reference to a pre-existing liability of another, if the plaintiff in accepting the promise does not release the principal. In reference to all such cases the authorities may be said to be entirely uniform. But the rule thus established as to cases where the question is one of the *several liability* of the party making the special promise, can, I think, have no application to the question of a joint liability upon a joint promise of the two. The only intimation to the contrary which I have seen is to be found in a dictum of Judge Catron in *Matthews* v. *Milton*, 4 Yerg. 576, a case in which no such question was involved, there being no evidence tending to show a joint promise. To say that when the party originally owing the debt, or for whom goods are purchased and to whom they are delivered, is liable at all, no other person can be held severally liable unless the promise be in writing, is merely saying that such promise is collateral, and, therefore, within the statute. But to say that they cannot both become jointly liable upon their joint promise, not in writing, to pay such debt or the price of such goods, if the party originally owing the debt or receiving the goods be at all liable, is but another form of declaring that it is *not competent* for both to become original promisors, as between them and the promisee, unless both are under an equal obligation, as *between themselves*, for the ultimate payment of the debt. Such a proposition, it seems to me, can not be maintained either upon principle or authority. Such an objection to a joint promise seems rather to have reference to some supposed defect of consideration (a question entirely distinct from the statute) than to the promise. And, if the party promising jointly with another to whom goods are furnished, can not be bound jointly with the latter, because, as between the two promisors, he, not having received the goods, is under no obligation to pay; then the same reason ought to operate with still greater force against his *several* promise to pay the *whole* price of goods received by the other. But the law in the latter case is well settled the other way.

It was very correctly remarked by WHELPLY, J., in *Hetfield et al.* v. *Dow*, above cited, that, "to settle the rights of promisors *inter sese*, to ascertain as *between them* who is to pay the debt ultimately, is no part of the object of the act. It by no means follows that he who by the arrangement between the promisors ultimately may be bound to pay the debt is, as *to the promisee*, the principal debtor. That does not concern him." This view, it seems to me, rests upon sound reasons—reasons which must naturally enter into the consideration of business men, in the ordinary transactions of business. Where a party has been willing to put himself in the position of an original promisor (either jointly or severally) to a vendor for goods purchased for the benefit of, or delivered to, another, the vendor has a right conclusively to presume that such relations or arrangements exist between the two as to make it the duty of the party or parties promising, as between themselves, to pay according to the promise. And to allow the contrary to be shown to defeat the promise would operate as a fraud upon the vendor.

The question of a joint promise appears to have been seldom raised for adjudication in connection with the statute of frauds; but the following cases fully sustain the proposition that a joint promise of two, whether to pay the pre-existing debt of one of them, or a debt contracted at the time for his benefit (as for goods bought for and delivered to the one), does not come within the statute, but it is an original promise, as between them and the promisee, and valid without writing: Ex parte Lane, 1 De Gex, 300; *Wainwright* v. *Straw*, 15 Vt. 215; *Stone* v. *Walker*, 13 Gray, 613; and *Hetfield* v. *Dow*, 3 Dutcher 440. See also by analogy

Batson v. *King*, 4 H. & N., 739. The same doctrine is laid down by Mr. Browne in his able treatise on the statute of frauds: Ch. 10, Sec. 197.

It is true that in *Wainwright* v. *Straw*, which most resembles the present case, the decision is placed in part upon the ground that the sale was made to both. The facts were that Straw and Cunningham both went to plaintiff's store and said they wished to buy a stove for Straw, but that both would be responsible. Now, I can see no difference in legal effect between the case where A and B say to a merchant, "We want to buy a stove for B, and both of us will be responsible," and the case where A says, "B wishes to purchase a stove, but we will both be responsible." *Substantially*, the transaction is the same; in both cases alike it is a sale for the benefit of the one on the joint credit of the two, and the real question in both cases is, whether the credit was given to both jointly. I do not think the court, in *Wainwright* v. *Straw*, based their decision upon the narrow and merely verbal ground of the use of the first person plural, showing merely who wanted the stove, but upon the broad ground above stated, that it was sold upon their joint credit. And in all such cases where the sale is upon the joint credit and promise of the defendants, though the property is purchased for and delivered to but one of them, I think the legal effect of the transaction constitutes, as between them and the vendor, a sale to the two jointly. The sale as between the vendor and the vendee is to the party or parties to whom the credit is given for the price, without reference to the question for whose use it is purchased, or who, as between the promisors, is to be its owner when bought.

This brings us to another point in the case. The sale (if upon the joint credit and promise of the defendants) was a joint sale to both, as between them and the plaintiff. But in the special count of the declaration it is alleged as a sale to Daily only. The plaintiff cannot, therefore, recover upon the special count.

But upon the count for goods sold and delivered, the sale having been made to both, the plaintiff would be entitled to recover, if the facts be such as would warrant a recovery upon a sale made for the joint benefit of, and the property delivered to both.

I think there was no error in the charge or proceedings of the court below, and that the judgment should be affirmed, with costs.

NOTE—The concurring opinion of CAMPBELL, J., and that part of the opinion of CHRISTIANCY, J., relating to questions other than the statute of frauds, are omitted.

MANLEY, Adm'strix, *vs.* GEAGAN (1870).

105 Mass. 445.

CONTRACT by the administratrix of Edwin Manley upon an oral promise to pay the following order:

"FALL RIVER, October 9, 1868.

"Nicholas T. Geagan.

"Sir: Please to pay Edwin Manley thirteen hundred and fifty-four dollars for work on your house, corner of Bedford and Twelfth streets, and charge the same to account of H. B. BORDEN & Co."

The answer denied all the plaintiff's allegations, and pleaded want of consideration, and the statute of frauds.

The trial was in the superior court, without jury, before *Pitman*, J., who made the following report of the case for the determination of this court:

"The plaintiff proved that her intestate, in whose favor the order was drawn, did work as a stone mason on a block of buildings belonging to the defendant, and which he was then erecting, prior to the time of drawing this order. It appeared that the whole contract was taken by H. B. Borden & Co., who employed the plaintiff's intestate to do the mason work, and that there was no contract between the plaintiff's intestate and the defendant, and no employment by the defendant; that after the work was done the defendant sent word to the plaintiff's intestate to get an order from Borden & Co. on him, adding, 'I am going to pay all off on the 10th, and am not going to trust Borden & Co. to pay it; I am going to see the help all paid;' and that this was communicated to the intestate; that the next day he procured the order in suit and presented it to the defendant; that the defendant took it, read it, said it was all right, and that he would accept it, and pay it on Monday; that on Monday he could not be found, was gone out of town for a week, and has since refused to pay it. The defendant who was called as a witness by the plaintiff, testified that he owed H. B. Borden & Co. nothing at the time when this order was presented: and I find as a fact that it is not proved that he actually did owe them anything. The defendant offered no evidence.

"Upon the above, the court ruled that the promise of the defendant, being an oral promise to pay the debt of another, and being also without any consideration, no action could be maintained on it, and thereupon found for the defendant. If this ruling is wrong, a new trial is to be had; otherwise, judgment on the verdict."

J. C. Blaisdell, for the plaintiff.

J. M. Morton, Jr., for the defendant.

GRAY, J. The promise of the defendant was to pay for work already done by the intestate for Borden & Company, without any previous contract with or employment by the defendant. The defendant owed Borden & Company nothing, and received no consideration, either from Borden & Company or from the intestate for his promise. The intestate neither did any work nor paid any money upon the faith of this promise, nor gave up any right or security against Borden & Company. Their original liability to him was not altered or affected by the defendant's promise. This promise was therefore clearly a promise to answer for the debt of another, and, not being in writing, was within the statute of frauds. Gen. Sts. c. 105, § 1, cl. 2. *Stone* v. *Symmes*, 18 Pick. 467; *Curtis* v. *Brown*, 5 Cush. 488; *Furbish* v. *Goodnow*, 98 Mass. 296; Browne on St. of Frauds, §§ 172-174.

Judgment on the verdict for the defendant.

KIRKHAM *vs.* MARTER, (1819).

2 Barn. & Ald., 613.

This was an action on an oral promise. The plaintiff declared that one T. E. Marter, before the making of the promise of defendant, had without the leave or license of the plaintiff, wrongfully ridden a horse of the plaintiff's, in consequence whereof the horse died; that the plaintiff had threatened to commence an action against said T. E. Marter for the recovery of such damages as plaintiff had sustained by reason of the premises; and thereupon, in consideration of the premises, and that the plaintiff, at the request of the defendant, would not bring any action against the said T. E. Marter for the cause aforesaid, and that the plaintiff would be content to take, for and on account of said horse, what should be agreed upon between the defendant and one A. B., defendant promised to pay plaintiff what should be agreed upon between defendant and said A. B. for and on account of said horse. Plaintiff further declared that he had brought no action for the cause aforesaid, and that he was willing to take, for and on account of the horse,, what had been agreed upon between the defendant and A. B., and that defendant and A. B. did agree that defendant should pay plaintiff fifty guineas for the said horse, and the bill due for the maintenance and keep of the said horse.

Breach: The non-payment of the said several sums.

Plea: General Issue.

On the trial of the cause the plaintiff proved an oral contract as laid in the declaration. ABBOTT, C. J., thought this an undertaking for the default or miscarriage of another within the statute of frauds, and consequently that the promise ought to have been in writing, and the plaintiff was non-suited.

Plaintiff moved for a new trial.

ABBOTT, C. J. This case is clearly within the mischief intended to be remedied by the statute of frauds, that mischief being the frequent fraudulent practices which were too commonly endeavored to be upheld by perjury; and if it be within the mischief I think the words of the statute are sufficiently large to comprehend the case. The words are these: "No action shall be brought to charge a defendant upon any special promise to answer for the debt, default or *miscarriage* of another person." Now the word "miscarriage" has not the same meaning as the word "debt" or "default"; it seems to me to comprehend that species of wrongful act for the consequences of which the law would make the party civilly responsible. The wrongful riding the horse of another, without his leave and license, and thereby causing its death, is clearly an act for which the party is responsible in damages and therefore, in my judgment, falls within the meaning of the word "miscarriage." The case of *Reed* and *Nash* (1 Wilson, 305), is very distinguishable from this: The promise there was to pay a sum of money as an inducement to withdraw a record in an action of assault, brought against a third person. It did not appear that the defendant in that action had ever committed the assault, or that he had ever been liable in damages; and the case was expressly decided on the ground that it was an original, and not a collateral promise. Here the son had rendered himself liable by his wrongful act, and the promise was expressly made in consideration of the plaintiff's forbearing to sue the son. I therefore think that the nonsuit was right.

Rule refused.[1]

NOTE—The concurring opinions of judges are omitted.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *vs.* BACKUS *et al.*, Appellants (1889).

117 N. Y. 196; 22 N. E. 759.

APPEAL from judgment of the General Term of the Supreme Court in the Third Judicial Department, entered upon an order made February 5, 1889, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought by the people against the defendants as guarantors upon the following bond or contract of the National Bank of Auburn, to-wit:

"Whereas certain moneys of the State of New York have been and are proposed to be deposited in the First National Bank of Auburn, under the direction of the comptroller of the state, by the agent and warden of Auburn prison, to the credit of the treasurer of the state, for safekeeping and for interest.

"Now, therefore, the said First National Bank of Auburn, in consideration of such deposits and for value received, does hereby agree to pay on demand, to the order of the state treasurer, or other officer of the state having lawful authority to demand the same, such deposits, and any and all parts thereof, together with interest on daily balance, at the rate of three per cent.

"Witness the seal of said Bank and the signature of its president and cashier, this 14th day of June, 1880."

The guaranty was as follows:

"In consideration of the making the deposits by the people of the State of New York in the First National Bank of Auburn, in the agreement mentioned, and for value received, we, the undersigned, Clinton T. Backus, Manson F. Backus, James Kerr and William E. Hughitt, do hereby jointly and severally guarantee the full and punctual performance of the condition of said agreement on the part of said bank, and that all such deposits and interest shall be fully paid on legal demand. The said guarantors may serve upon the comptroller a written notice, terminating or limiting their liability under this guaranty, after a date to be specified in said notice, which shall not be less than ten days after the service of said notice."

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[1] To the same effect are: *Turner* v. *Hubbell*, 2 Day, 457; *Baker* v. *Morris*, 33 Kan. 580, s. c. 7, P. 267.

The agent and warden was by law the official manager of the state prison at Auburn, and was requested to deposit all moneys credited by him each week to the credit of the treasurer of the state, in a bank located at Auburn, and send to the comptroller weekly a statement showing the amount so received, and from whom or where received and deposited, and the days on which such deposits were made, such statement to be certified by the proper officer of the bank receiving such deposits. The agent and warden was required to verify by his affidavit that the sum so deposited was all the money received by him from whatever source of prison income during the week and up to the time of the deposit, and all moneys so deposited by him were subject to the quarterly drafts of the treasurer of the state. The law required that any bank in which deposits should be made should, before receiving any such deposit, file a bond with the comptroller of the state, subject to his approval, for such sum as he should deem necessary. § 50, Chap. 460, Laws of 1847, as amended by Chap. 58, Laws of 1854, and Chap. 599, Laws of 1860. By section 6 of Chapter 177 of the Laws of 1877, it was provided that "The system of labor in the state prisons shall be by contract or by the state or partly by one system and partly by the other, as shall in the discretion of the superintendent be deemed best." From the time of the execution of the bond until December, 1884, the business of the Auburn state prison was carried on under what was known as the contract system. By chapter 21 of the Laws of that year, the renewal of the then existing contracts, or the making of new contracts for convict labor, was prohibited and after that the prisoners were employed in manufacturing on state account. The bank was incorporated under the National Bank Act of 1863, on the 31st day of December of that year, and by its articles of association it was provided that it should continue until the 25th day of February, 1883 unless sooner dissolved by the act of a majority of the stockholders thereof. By the Act of Congress, passed July 12, 1882, (U. S.

Stats. at Large, Vol. 22, p. 162,) National Banks were authorized to extend their corporate existence; and in January, 1883, such proceedings were taken under that act as to extend the charter of the bank and its corporate existence until the 24th day of February, 1903 By section 4 of that act it is provided that "any association so extending the period of its existence shall continue to enjoy all the rights and privileges and immunities granted, and shall continue to be subject to all the duties, liabilities and restrictions imposed by the Revised Statutes of the United States, and other acts having reference to national banking associations, and it shall continue to be in all respects the identical association it was before the extension of its period of existence."

After the giving of the bond by the bank and the guaranty by the defendants, the agent and warden of the prison made deposits in the bank, from time to time, down to February, 1888, on which day there was upward of $65,000 on deposit in the bank, which it refused and neglected to pay upon the draft of the State Treasurer, it having become insolvent, and this action was brought against the defendants, as sureties, to recover the amount remaining on deposit.

William F. Cogswell, for appellant.

Charles F. Tabor, attorney-general, for respondent.

EARLE, J. No citation of authorities is needed to show that the contracts of sureties are to be construed like other contracts so as to give effect to the intention of the parties. In ascertaining that intention we are to read the language used by the parties in the light of the circumstances surrounding the execution of the instrument, and when we have thus ascertained their meaning we are to give it effect. But when the meaning of the language used has been thus ascertained, the responsibility of the surety is not to be extended or enlarged by implication or construction, and is *strictissimi juris*.

After the contract system in the state prisons was abolished, and manufacturing therein could be done only on state account, the amount of money deposited in this bank by the agent and warden largely increased, and it is now claimed on behalf of the defendants that their responsibility as sureties was largely extended beyond what was contemplated at the time of the execution of their guaranty, and that they are therefore discharged.

By the statutes in force at the time of the execution of the bond and guaranty, the agent and warden of the prison was required to deposit all the moneys received by him from any source in the bank. It is not reasonable to suppose that the sureties, when they signed their guaranty, had in mind the particular source from which the agent and warden received the money. They must have known that they became responsible for all the moneys, from whatever source, coming into his hands to be deposited. It cannot be supposed that they had in mind that the system of labor then in force at the prison would remain unchanged for an indefinite time, or that they cared anything about it. Much stress is laid upon the words in the bond, "certain moneys," which had been and were proposed to be deposited. We think those words have reference to the moneys to be deposited by the agent and warden of the prison, as distinguished from other moneys of the state. They were intended to point out the source from which the moneys of the state to be deposited should come; and the words "such deposits," used later in the bond, have reference to the deposits to be made by the agent and warden of the prison. So, the bond, in the most general terms, covers and applies to all the money to be deposited in the bank, under the direction of the comptroller of the state, by the agent and warden of the prison. The words "certain moneys" and "such deposits" do not indicate that the parties then had in mind the source from which the agent and warden should receive his money, or the particular moneys which he had theretofore deposited. But they manifestly have reference to all the moneys which, under the direction of the Comptroller, he might deposit in the bank. The bank desired to get all the deposits it could, and the defendants, who were directors and officers of the bank, desired to secure all the deposits. It cannot be supposed that they contemplated, at the time they signed their guaranty, that their liability was to be limited or restricted to the amounts which had been previously deposited, or that those amounts had any influence whatever upon their action. They must therefore be held to the plain language of their guaranty, and in holding that it covers moneys deposited subsequently to 1884, we do not extend their responsibility by implication or construction, but simply hold them to the responsibility plainly expressed in the language of the bond and the guaranty.

It is still further claimed, on the part of the defendants, that they are discharged from any liability on their guaranty on account of the extension of the existence of the corporation in 1883, before any default on the part of the bank, and for this contention the learned counsel for the defendants cites *Thompson* v. *Young*, 2 Ohio, 334; *Union Bank* v. *Ridgeley*, 1 H. & G. 324; *Bank of Washington* v. *Barrington*, 2 Pa. 27; *Brown* v. *Latimore*, 17 Cal. 93. None of those cases are precisely like this in their circumstances, but so far as they uphold the contention of the defendants we are quite unwilling to follow them. The contrary doctrine was held in *Exeter Bank* v. *Rogers*, 7 N. H. 21; and we think our decision in *National Bank of Poughkeepsie* v. *Phelps*, 97 N. Y. 44, is ample authority for the maintenance of this recovery, notwithstanding extension of the corporate existence of the bank. In the latter case, under the provisions of the National Banking Act and of chapter 97 of the Laws of 1865, the state bank was transformed into a national bank, and it was held to be but a continuance of the same body under a changed jurisdiction; that between it and those who had contracted with it, it retained its identity and might, as a national bank, enforce contracts made with it as a state bank; that where a state bank, at the time of its change to a national bank, held a continuing guaranty of loans made by it upon the strength of which it had made loans, and after the change had made further advances, an action was maintainable by the national bank upon the guaranty, and that the guarantor was liable for the loans made, both before and after the change. Here a new corporation was not formed; but there was a mere prolongation of the existence of the same corporation whose corporate identity was not changed or lost. The bank which defaulted was the same bank for which the defendants became bound. There were not two banks in succession, but all the time one bank. Its charter was amended so as to extend its existence; and in the original national banking act (§ 67), it was provided that Congress could, at any time, "amend, alter or repeal this act." It would certainly be a very inconvenient rule to hold that all the contracts of sureties to the bank, and of sureties by the bank, to other persons should be destroyed by every material change or alteration in its charter. The contract was entered into by the sureties with knowledge of this law, and it became a part of their contract as if they had stipulated that the changes or alterations might be made. The act of 1882 was a mere amendment or alteration of the previous banking act.

Henry E. Carter

We do not deem it important to consider the effect that should be given to the fact that these various defendants, as officers of the bank, procured the extension of its existence, of which they now seek to take advantage.

For the reasons we have already given, and those so well expressed in the opinion of the learned referee before whom the case was tried, we think the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

STARR ET AL. *vs.* MILLIKIN (1899),

180 Ill. 458; 54 N. E. 328.

Appeal from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Macon county; the Hon. EDWARD P. VAIL, J., presiding.

LeForgee & Lee, and *Mills Bros.,* for appellants.

I. A. Buckingham and *Hugh Crea,* for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

Suit was brought in the Circuit Court of Macon county by William H. Starr and Isaac R. Mills, for the use of William H. Starr, against James Millikin, upon the following contract:

> "Whereas, Murray G. Millikin has purchased of Starr & Mills lot sixteen (16) and fifteen feet off of the east side of lot fifteen (15), in block three (3), in Starr & Mills' addition to the city of Decatur, for the sum of $800; and whereas, the said Murray G. Millikin has given to the said Starr & Mills his certain promissory notes to secure the payment of said consideration, together with a mortgage upon said premises; and whereas, the said Murray G. Millikin is a minor under the age of twenty-one years but is desirous of having the deed to said lots so purchased made to him:
>
> "Now, therefore, in consideration of the premises and in consideration of the making of the deed direct to the said Murray G. Millikin, I, James Millikin, do hereby guarantee that the said Murray G. Millikin will ratify said purchase and the giving of said notes upon his arrival at

the age of twenty-one years, in such manner as will make him personally liable on said notes so given for said purchase money, and in the event that said Murray G. Millikin shall repudiate or refuse to pay said notes I hereby agree to pay the same to the said Starr & Mills, or their assigns.

"Dated at Decatur, Illinois, this 26th day of June, A. D. 1893.

JAMES MILLIKIN."

A verdict was returned in the trial court against appellee for $1076.88. Judgment was rendered on this verdict, but on appeal to the Appellate Court for the Third District the judgment was reversed without remanding, the Appellate Court at the same time making a finding of facts to be recited in its final order.

The Appellate Court found from the evidence in the case that James Millikin undertook, in the contract above mentioned, to pay the sum of money therein mentioned upon condition, only, that Murray G. Millikin, a minor, upon his arrival at the age of twenty-one years, would fail to ratify the notes in controversy in such manner as would make him personally liable, or if the minor should repudiate or refuse to pay the notes on account of their having been executed during his minority. This finding of facts was the result of the legal construction given the contract by the Appellate Court. That court also found as a fact arising out of the evidence, that upon his arrival at the age of majority Murray G. Millikin did ratify the notes made by him, thus making himself personally liable, and that he did not repudiate or refuse to pay them on account of their having been executed during his minority. As this record is presented to us, therefore, only one question is involved. This is conceded by counsel for appellants, as they say that the construction to be placed upon this contract is the only real question involved in the litigation in this court, and that this question, when determined, ends the controversy.

The finding by the Appellate Court as to the legal construction to be given this contract is not such a finding of fact is is binding upon this court. The construction to be given a contract is one of law, rather than of fact. However, that is not material in this case, as we in nowise differ from the Appellate Court as to the legal construction to be given the contract. Starr & Mills were conveying some property to Murray G. Millikin, a minor. From the fact that upon his arrival at his majority he would have the right, in law, to repudiate the notes or refuse payment on account of their having been executed during his minority, this separate contract was executed to guarantee there should be no such refusal or repudiation. The entire controversy occurs over the last clause of the contract, which reads: "In the event that said Murray G. Millikin shall repudiate or refuse to pay said notes I hereby agree to pay the same to said Starr & Mills, or their assigns." This clause, however, when taken in connection with all the circumstances of the case and the recitals in the contract preceding this clause, to the effect that Murray G. Millikin was a minor under the age of twenty-one years and that he was desirous of having the deeds to the lots made to him, and that appellee guaranteed Murray G. Millikin would ratify such purchase and the giving of said notes upon his arrival at the age of twenty-one years, tends to establish, without question, that the only purpose of the execution of this contract was that the notes should not be repudiated or payment refused on account of the age of the maker. It is evident that there was no intention on the part of James Millikin to personally guarantee the payment of this indebtedness. The parties connected with the transaction were all business men,—one a banker, another a lawyer,—and if the intention had been to personally guarantee this indebtedness such guaranty would have been on the back of the note, or as a joint maker, or in some other manner much less cumbersome than as shown by this record.

The construction given this contract by the Appellate Court was the correct one, and the judgment of that court will be affirmed.

Judgment affirmed.

Davis *vs.* Patrick (1891).

141 U. S. 479; L. Ed'n, Bk. 35 826.

The case was stated by the court as follows:

This case was commenced on the 24th day of November, 1880. by the filing of a petition in the District Court of Knox county, Nebraska. Subsequently it was removed to the Circuit Court of the United States, and at the May term, 1883, of that court a judgment was rendered in favor of the plaintiff. That judgment was reversed by this court, at its October term, 1886. *Davis* v. *Patrick*, 122 U. S. 138. A second trial in January, 1890, resulted in another verdict and judgment for the plaintiff, and again the defendant alleges error. The petition counts on two causes of action. No question is made by counsel for plaintiff in error with respect to the first count or the rulings thereon—the only error alleged being in reference to the second count. That count is for the transportation of silver ore from the Flagstaff mine, in Utah Territory, to furnaces at Sandy, in the same Territory. In the first trial it was claimed that Davis, the defendant, was the real owner of the Flagstaff mine, and therefore primarily responsible for all debts contracted in its working. The relations between Davis and the Flagstaff Mining Company were disclosed by a written agreement, of date December 16, 1873. By that agreement it appeared that Davis, on June 12, 1873, had advanced to the Company £5,000, at the rate of 6% interest, a sum then due; that it had sold to Davis and agreed to deliver at the ore-house of the Company, free of cost, 5,195 tons of ore, of which it had only then delivered 200 tons, although Davis had paid in full for the entire amount. The agreement also recited that Davis was to advance an additional amount, if needed, not exceeding £10,000. It then provided that the mine should be put under the sole management of J. N. H. Patrick, to be worked and controlled by him until such time as the ore sold had been delivered and the sums borrowed had been repaid, with interest. This control was irrevocable, save at the instance of Davis. Coupled with this agreement was a full power of attorney to Patrick. This court held that such contract established between Davis and the Mining Company simply the relation of creditor and debtor, and did not make him in any true sense the owner. For the erroneous rulings of the trial court in this respect, the judgment was reversed. In the second trial, this construction of the relations of Davis to the Flagstaff Mining Company was followed by the court, and the jury instructed that the contract put in evidence between Davis and the Mining Company created simply the relations of creditor and debtor, and did not make the former liable for expenses created in working and operating the mine; and the trial proceeded upon the theory that during the time the services sued for were being rendered, Davis was the party mainly and pecuniarily interested in the workings of the mine, and that he assumed to Patrick a personal responsibility for such services; and the real question tried was whether Davis' promises were collateral undertakings to pay the debts of another, and void because not in writing.

(In the opinion of the court, *post*, 485–487, some of the material evidence at the last trial is set forth.)

Mr. J. M. Woolworth, for plaintiff in error.

Mr. John L. Webster, for defendant in error. *Mr. Nathaniel Wilson* was with him on the brief.

Mr. Justice BREWER, after stating the case, delivered the opinion of the court:

That Davis was interested in having the ore transported to the furnaces is clear. He was interested in two respects: First, as to the 4,995 tons to be delivered to him at the ore-house, it being his property when thus delivered, any subsequent handling was solely for his benefit; and in respect to the balance, as the transportation was one step in the process of converting the product of the mine into money, it would help to pay the debt of the Company to him. Davis, therefore, was so pecuniarily interested in, and so much to be benefited by, the prompt and successful transportation of the ore, that any contract which he might enter into in reference to it, was supported by abundant consideration. We proceed, therefore, to inquire what he said and did. After the execution of the papers, the newly appointed manager took possession of the mine; and in the fore part of 1874 the plaintiff commenced the transportation of the ore under contract with the agent of the manager. The business was carried on in the name of the Mining Company. The plaintiff understood that Davis was interested in the matter, though not informed as to the extent of the interest, or the terms of the agreement beween him and the Mining Company. In the fall of 1874 Davis came to Utah to examine the property. He was introduced by the manager to the foreman of plaintiff, in the latter's presence, as the boss of the mine, to which Davis assented. After this, plaintiff, who had not received his pay in full for the services already rendered, had an account made up showing the balance due him, and presented it to Davis. His testimony as to the conversation which followed is in these words: "I showed it to Mr. Davis and told him I was not getting my money, and Mr. Davis said my account was all right and he would be personally responsible to me for the money, and for me to go on as I had been doing and draw as little money as I could get along with to pay the men and the running expenses, and he would see that I got every dollar of my money." The plaintiff's cashier, who was present at this conversation, gives this as his recollection of the conversation:

"Q. In that conversation state what Mr. Davis said about being responsible to A. S. Patrick for that account.

"A. He stated to Mr. Patrick in my presence that he would personally be responsible for that account. He says, 'You know, Al., I practically own this mine, but money is scarce and we must get what you can out of the mine.' He says we are making large expenditures for improvements, and he says you shall have all the money you want to pay your men and expenses, but you must wait for the balance, and I will see that you are paid.

"Q. What did he say in that connection to A. S. Patrick about continuing on in the hauling of the ores?

"A. He requested him to continue in the hauling of the ores. He requested him to do it.

"Q. In response to Mr. Davis to that request what did Mr. Patrick say?

"A. He said to Mr. Davis, if he would guarantee him to be paid he would continue to work, and Davis said he would see him paid."

After this, the plaintiff continued the work of transportation until the fall of 1875, receiving such payments from time to time as to extinguish the amount due him at the date of this conversation, and leaving a balance more than covered by the work done in 1875, and it is only for work done after these promises that this recovery was had and in respect to which the questions presented and discussed arise. The plaintiff testified to another conversation, in September, 1876, in the city of New York. His account of that conversation is given in these words: "Plaintiff told Davis that his brother and himself were hard up for money, and wanted to know if Davis would not give them some money on the 'Flagstaff' account, for hauling the ores. Plaintiff had his account with him and showed it to Davis. Davis said the whole of the account was all right, and he proposed to pay the account, and said he would pay the plaintiff. Plaintiff said to Davis that if he would give him some money on the account it would help him out. Davis said he had some securities in London which he was going to sell, and would have some money in a few days and would give plaintiff $5,000 on the account. Plaintiff said if the money was going to be there in a few days he would wait for it, but Davis said, 'No; you go home and I will pledge you my word that I will telegraph the money to you to the First National Bank by the first of October.' "

And, again, he testified to an interview in 1877 with Davis, in the city of Omaha, in the presence of other parties, in which he said: "Davis, you promised all along to pay me that money," and Davis replied, "I believe I did."

This testimony of plaintiff as to conversations with defendant is corroborated by other witnesses and contradicted by none. It must therefore be accepted as presented the facts upon which this case must be determined. Were these promises binding upon Davis, or of no avail to the plaintiff because not in writing? Were it not for the Statute of Frauds there would be no question, for obviously there was both promise and consideration. Defendant relies upon that provision of the Statute of Frauds which forbids the maintenance of an action "to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing," etc. The purpose of this provision was not to effectuate, but to prevent, wrong. It does not apply to promises in respect to debts created at the instance and for the benefit of the promisor, but only to those by which the debt of one party is sought to be charged upon and collected from another. The reason of the statute is obvious, for in the one case if there be any conflict between the parties as to the exact terms of the promise, the courts can see that justice is done by charging against the promisor the reasonable value of that in respect to which the promise was made, while in the other case, and when a third party is the real debtor, and the party alone receiving benefit, it is impossible to solve the conflict of memory or testimony in any manner certain to accomplish justice. There is also a temptation for a promisee, in a case where the real debtor has proved insolvent or unable to pay, to enlarge the scope of the promise, or to torture mere words of encouragement and confidence into an absolute promise: and it is so obviously just that a promisor receiving no benefits should be bound only by the exact terms of the promise, that this statute requiring a memorandum in writing was enacted. Therefore, whenever the alleged promisor is an absolute stranger to the transaction, and without interest in it, courts strictly uphold the obligations of this statute. But cases sometimes arise in which, though a third party is the original obligor, the primary debtor, the promisor has a personal, immediate and pecuniary interest in the transaction, and is therefore himself a party to be benefited by the performance of the promisee. In such cases the reason which underlies and which prompted this statutory provision fails, and the courts will give effect to the promise. As said by this court in *Emerson* v. *Slater*, 22 How. 28, 43: "Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." To this may be added the observation of Browne, in his work on the Statute of Frauds, Sec. 165: "The statute contemplates the mere promise of one man to be responsible for another, and cannot be interposed as a cover and shield against the actual obligations of the defendant himself." The thought is, that there is a marked difference between a promise which, without any interest in the subject matter of the promise in the promisor, is purely collateral to the obligation of a third party, and that which, though operating upon the debt of a third party, is also and mainly for the benefit of the promisor. The case before us is in the latter category. While the original promisor was the mining company, and the undertaking was for its benefit, yet the performance of the contract inured equally to the benefit of Davis and the mining company. Performance helped the mining company in the payment of its debt to Davis, and at the same time helped Davis to secure the payment of the mining company's debt to him; and as the mining company was apparently destitute of any other property, and the payment of its debt to Davis therefore dependent upon the continual and successful working of this mine; and as the control and working of the mine had been put in the hands of Davis so that he might justly say, as he did: "I am practically the owner," it follows that he was a real, substantial party in interest in the performance of this contract. His promise was not one purely collateral to sustain the obligations of the mining company, but substantially a direct and personal one to advance his own interests. While the mining company was ultimately to be benefited, Davis was primarily to be benefited by the transportation of the ore, for thereby that debt, which otherwise could not, would be paid to him. He, therefore, in any true sense of the term, occupied not the position of a collateral undertaker, but that of an original promisor, and it would be a shadow on justice if the administration of the law relieved him from the burden of his promise on the ground that it also resulted to the benefit of the mining company, his debtor.

Counsel for Davis placed stress on the form of expression attributed by Patrick to Davis, to-wit: "I will be personally responsible; I will see you paid;" and contends that the import of such language is that of a collateral promise. There is force in this contention, as it implies that someone else was also bound, but the real character of a promise does not depend altogether upon the form of expression, but largely on the situation of the parties; and the question always is, what the parties mutually understood by the language, whether they understood it to be a collateral or a direct promise. Patrick declares he understood it to be a direct promise, and acted on the faith of it. That Davis understood it in the same way, is evidenced not only from the circumstances surrounding the parties at the time, but from the fact that in a subsequent interview, when charged to have always promised to pay this debt, he admits that he believes that he did. The plaintiff, believing that Davis was, as he said, practically the owner, the party primarily to be benefited by the conversion of the products of the mine into money, understood that Davis was making an original promise to pay for the work which he might do, and upon such promise he might surely rely as an original promise, at least for any work done thereafter.

The merits of the case, therefore, as disclosed by the testimony, were with Patrick, and the judgment in his favor was right. It is objected that the court in its instructions spoke of Davis as an original promisor, as one promising to pay the debt, and not as one promising to be responsible for the debt, or to see it paid. But as Davis, in the second conversation, promised to pay, and in the third admitted that he had always promised to pay the debt, we cannot think that the court misinterpreted the scope and effect of his words. It is not probable that the parties to this transaction understood the difference between an original and a collateral promise. We must interpret Davis's promise in the light of the surroundings and of his subsequent admissions, and in that light we cannot think that the court erred in its construction thereof; and if the jury believed that he had made such promises, we cannot doubt that the verdict should have been as it was.

It is also objected that the court erred in not directing a verdict for defendant upon the ground of a departure from the allegations of the petition. That counts on an original employment by Davis, in 1873, while the testimony shows that the original employment was by the mining company, and that the promise of Davis was made in the fall of 1874, and after Patrick had been at work for months for the mining company. As no objection was made to the admission of testimony on this ground, and as an amendment of the petition to correspond with the proof would involve but a trifling change, we cannot see that there was any error in the ruling of the court. If objection had been made in the first instance, doubtless the court would, as it ought to have done, have permitted an amendment of the petition. There was no surprise, for the facts were fully developed in the former trial.

Upon the record as presented, we think that the verdict and judgment were right, and as no substantial error appears in the proceedings the judgment is

Affirmed.

The CHIEF JUSTICE, Mr. Justice BRADLEY and Mr. Justice GRAY did not hear the argument nor take part in the decision of this case.

HOOKER *et al.*, Respondents, *vs.* RUSSELL, Appellant (1886).

67 Wis. 257; 30 N. W. 358.

Appeal from the County Court of Fond du Lac County.

Sutherland & Sutherland, for appellant.

Eli Hooker and *C. E. Hooker*, for respondents.

The facts will sufficiently appear from the opinion.

ORTON, J. In 1883 the village board of the village of Brandon, in Fond du Lac county, determined that no license for the sale of intoxicating liquors in said village should be granted during the ensuing year, and passed an ordinance prohibiting such sale and providing for the punishment of those who should violate the same. Certain persons continued to sell intoxicating liquors in said village notwithstanding, and in violation of said ordinance, and in July, 1883, said village board, by resolution, employed the said plaintiffs and respondents to act as the attorneys of the village in the prosecution of such offenders. The respondents, as such attorneys of the village, commenced several prosecutions under such employment, and rendered therein legal services, amounting in value to $173.66, up to and including September 7, 1883, when on that day an injunction was served upon said village, at the suit of one David Whitton, a taxpayer of said village, restraining the village board from appropriating or paying out of the treasury any money for the payment of attorneys' fees in the prosecution of criminal actions theretofore or thereafter had for the violation of the excise laws of the state, and from appropriating or paying any money for expenses incurred in such prosecutions. Notwithstanding said injunction, the respondents continued to render legal services for said village in such prosecutions up to and including the 26th day of January, 1884, the value of which then was the sum of $657.34, including the above amount of $173.66. The bill for these services was presented to and filed with the village board as a claim against the village, and the respondents brought suit against the village therefor, which suit is still pending.

The seventh finding of fact, which must be received as a verity in the case as neither party has excepted thereto, is as follows: "That on or about the 8th day of September, 1883, and subsequent to the service of such injunctional order upon said village, the defendant, George A. Russell, requested the plaintiff to continue said prosecutions notwithstanding said injunction, and promised and agreed to pay them for their past and future services therein *in case of their inability to collect their claim therefor from said village.*" It was on this promise that this suit was brought against the appellant, and on which the respondents recovered in the county court. There can be no question but that this special promise of the appellant, not in writing, to answer for the debt of the village of Brandon, is void by the statute of frauds (R. S. sec. 2307, subd. 2). The services of the respondents were rendered for the village, and under a contract with the village. They have presented their claim to, as being against, the village, and have sued the village as being liable therefor. "So long as the original debt remains payable by the debtor to his creditor, any arrangement whatever by which another party promises to pay that debt is within the very letter of the statute, no matter from what souce the consideration of the latter promise is derived." *Emerick* v. *Sanders,* 1 Wis. 77; *Cotterill* v. *Stevens,* 10 Wis. 422; *Cook* v. *Barrett,* 15 Wis. 596.

Against the operation of the statute upon this promise it is claimed (1) that it has been judicially determined, in the injunction suit against the village, that the village is not liable for such services. It is sufficiently answered that neither of these parties was a party to that suit, and therefore not bound by the judgment therein. But, again, it was a suit in equity, and there might have been other reasons for the injunction than that the village was not legally liable on the contract to pay their attorneys for their services in the prosecutions. (2) It is claimed that for future services of the respondents the credit was given to the appellant. All the services were performed under one contract with the village. It is so alleged in the complaint, and the respondents not only so testify, but they have preferred their claim against the village, and brought suit against the village for it. The village has never been released from any part of it. (3) It is claimed that the appellant originally promised to pay for such future services on a new consideration of benefit or advantage to himself as a citizen and officer of the village, having an interest in enforcing the laws against the sale of intoxicating liquors. His zeal in the cause of temperance, and his interest in enforcing the laws in common with all other citizens, would scarcely be a good or valuable consideration for a promise to pay. But the above finding is sufficient to show that the same promise embraced the payment for the past and future services alike.

We shall not decide in this case whether the village of Brandon is liable to the respondents on its contract, although the county court found, as a conclusion of law, that the village was not liable and had no authority to make the contract. The village is not a party to this suit, and has not denied its liability in this suit. The village is presumptively liable, for it has the capacity to contract. It will be in time to decide the question of the liability of the village on this particular contract when the action of the respondents against the village to enforce it is on trial.

Are the respondents bound by the finding in this case that the village is not liable? It can only be determined whether the respondents are able to collect their claim against the village, when their suit for that purpose, now pending, shall be tried. In any view that can be properly taken of this promise, it is a collateral one and void.

By the Court.—The judgment of the county court is reversed, and the cause remanded for a new trial.

SUTTON & CO. *vs.* GREY (1893).

1 Q. B. Div. (1894), 285.

Appeal by the defendant against the judgment of Bowen, L. J., at the trial of the action without a jury.

The plaintiffs were stockbrokers and members of the London Stock Exchange. The defendant was not a member of the Stock Exchange. The plaintiffs had, as they alleged in their statement of claim, in January, 1891, entered into an oral agreement with the defendant that he should introduce clients to them, and that they should transact business on the Stock Exchange for the clients thus introduced, upon the terms, as between the plaintiffs and the defendants, that he should receive one-half the commission earned by the plaintiffs in respect of any transactions by them for and on behalf of such clients as were introduced by the defendant, and that the defendant should pay to the plaintiff one-half of any loss which might be incurred by the plaintiffs in respect of those transactions.

The plaintiffs claimed from the defendant half the loss which they had incurred in Stock Exchange transactions which they had entered into on behalf of a client named Robertson, who had been introduced to them by the defendant in pursuance of the oral agreement.

By his statement of defence, the defendant pleaded that Sec. 4 of the Statute of Frauds had not been complied with; that the contract alleged by the plaintiffs was, within the meaning of Sec. 4 of the Statute of Frauds (29 Car. 2, c. 3), "a special promise to answer for the debt of another person"; and that, consequently, as it was not in writing, an action upon it could not be maintained.

Stevenson, for defendant.

Rufus Isaacs, for the plaintiffs, was not called upon.

Lord Esher, M. R. In my opinion this appeal should be dismissed. I think that the judgment of Bowen, L. J., was in every respect right. I do not think that the relation between the plaintiffs and the defendant was that of partnership. They had no intention to become partners, and, as the law now stands, a partnership can not be constituted without such an intention. In my opinion the true relation between the plaintiffs and the defendant was this: The plaintiffs being brokers upon the Stock Exchange, of which the defendant was not a member, they agreed together that the plaintiffs should carry out transactions upon the Stock Exchange for the mutual benefit of themselves and the defendant. The defendant could not himself transact business upon the Stock Exchange, and the plaintiffs made this agreement with him: "If you will find persons who wish to operate upon the Stock Exchange and will introduce them to us as clients, we will, on behalf of the persons whom you thus introduce to us, transact the ordinary business of a broker on the Stock Exchange, and make ourselves personally responsible according to its rules on these terms—that our brokers' commission on the Stock Exchange shall be divided between us and you, just as if you were our partner and a member of the Stock Exchange, and that, if there should be a loss in respect of the transactions, you shall indemnify us against half the loss." The defendant verbally agreed to this, but there was not any contract or memorandum in writing. The contract, in my opinion, is one which regulated the part which the defendant was to take in the transactions which were contemplated, and, if he was to be an agent for the plaintiffs, the contract regulated the terms of his agency. Again, before the transactions were entered into, the terms were regulated by the agreement, and they were such as to give the defendant an interest in the transactions. The transactions were to be entered into by the plaintiffs partly for their own benefit and partly for the benefit of the defendant. Is such a contract a simple contract of guarantee—"a special promise to answer for the debt or default of another person"—so as to bring the case within Sec. 4 of the Statute of Frauds, or is it a contract of indemnity? Whether any contract is the one or the other is often a very nice question. But certain tests have been laid down to guide the Court in determining under which head any particular contract comes. The principal case in English law which affords such a guide is *Courtier* v. *Hastie*, 8 Ex. 40. In that case a test was given by Parke, B., who delivered the judgment of himself and ALDERSON, B. (from whom POLLOCK, C. B., differed as to the construction of the contract). The learned Judge said (at p. 55): The other and only remaining point is, whether the defendants are responsible by reason of their charging a *del credere* commission, though they have not guaranteed by writing signed by themselves. We think they are. Doubtless if they had for a percentage guaranteed the debt owing, or performance of the contract by the vendee, being totally unconnected with the sale" (I would read that "totally unconnected with the transaction"), "they would not be liable without a note in writing signed by them; but, being the agents to negotiate the sale" (that is, as I read it, "being connected with the transaction"), "the commission is paid in respect of that employment; a higher reward is paid in consideration of their taking greater care in sales to their customers, and precluding all questions whether the loss arose from negligence or not and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them; and, though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given." There the test given is, whether the defendant is interested in the transaction, either by being the person who is to negotiate it or in some other way, or whether he is totally unconnected with it. If he is totally unconnected with it, except by means of his promise to pay the loss, the contract is a guarantee; if he is not totally unconnected with the transaction, but is to derive some benefit from it, the contract is one of indemnity, not a guarantee, and Sec. 4 does not apply. The rule thus laid down has been adopted as a test in subsequent cases. In *Fitzgerald* v. *Dressler,* 7 C. B. (N. S.) 374, COCKBURN, C. J., said (at p. 392): "The law upon this subject is, I think, correctly stated in the notes to *Forth* v. *Stanton,* 1 Wms. Saund. 211e, where the learned editor thus sums up the result of the authorities: 'There is considerable difficulty in the subject, occasioned perhaps by unguarded expressions in the reports of the different cases; but the fair result seems to be that the question whether each particular case comes within this clause of the statute (Sec. 4) or not depends, not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.' I quite concur in that view of the doctrine, provided the proposition is considered as embracing the qualification at the conclusion of the passage; for, though I agree that the consideration alone is not the test, but that the party taking upon himself the obligation upon which the action is brought makes himself responsible for the debt or default of another, still it must be taken with the qualification stated in the note above cited, viz., an absence of prior liability on the part of the defendant or his property, it being, as I think, truly stated there as the result of the authorities, that if there be something more than a mere undertaking to pay the debt of another, as, where the property in consideration of the giving up of which the party enters into the undertaking is in point of fact his own, or is property in which he has some interest, the case is not within the provision of the statute, which was intended to apply to the case of an undertaking to answer for the debt, default, or miscarriage of another, where the person making the promise has himself no interest in the property which is the subject of the undertaking. I, therefore, agree with my learned brothers that this case is not within the Statute of Frauds." The learned Judge there used the words, "has himself no interest in the property which is the subject of the undertaking," because he was dealing with a case of property; but if his words be read, as I think they should be, "has no interest in the transaction," he is adopting that interpretation of *Couturier* v. *Hastie,* 8 Ex. 40, which I think is the right one. Then again, in *Fleet* v. *Murton* (Law Rep. 7 Q. B. at p. 133), BLACKBURN, J., quotes the passage which I have read from the judgment of PARKE, B., in *Couturier* v. *Hastie* (8 Ex. 40), and thus interprets it: "He says that it is neither a guaranteeing nor a contract for sale, and that consequently the Statute of Frauds is out of the question. It seems to me, therefore, as Mr. Cohen said, that this custom must be taken as merely regulating the terms of the employment." If in the present case the agreement is taken as regulating the terms of the defendant's employment, it is not within Sec. 4 of the statute; on the other hand, if the transaction is looked at as entered into partly for the benefit of the plaintiffs and partly for the benefit of the defendant, it comes within the rule laid down by PARKE, B., in *Couturier* v. *Hastie*, and adopted by COCKBURN, C. J., in *Fitzgerald* v. *Dressler*. The contract is not a guarantee with regard to a matter in which the defendant has no interest except by virtue of the guarantee; it is an indemnity with regard to a transaction in which the defendant has an interest equally with the plaintiffs. In my opinion, BOWEN, L. J., was right in holding that the agreement is not within the statute, and his decision ought to be affirmed.

LOPES, L. J. I am of the same opinion. BOWEN, L. J., has adopted the view of the plaintiffs, that the contract was one of indemnity, and I think he was right in so holding. The defendant says that the contract amounts to "a special promise to answer for the debt or default of another person," and is therefore within the statute. The true test, as derived from the cases, is, as the master of the Rolls has already said, to see whether the person who makes the promise is, but for the liability which attaches to him by reason of the promise, totally unconnected with the transaction, or whether he has an interest in it independently of the promise. In the former case, the agreement is within the statute; in the latter, it is not. In the present case, it appears to me beyond all question that the defendant had an independent interest in the transaction, because it was entered into for the mutual benefit of the plaintiffs and himself. In another view, the contract was to regulate the terms of the defendant's employment by the plaintiffs. In my opinion, the decision of BOWEN, L. J., was right, and the appeal must be dismissed.

KAY, L. J. According to the report which I have of the judgment of BOWEN, L. J., he said, "I have come to the conclusion that the plaintiffs are correct in saying that it was arranged between them and the defendant that he should contribute to any loss that might occur to them upon Robertson's transactions." I agree that this arrangement hardly comes up to a partnership, though it is very near it. The commission received in respect of any transaction might not be all clear profit; the expenses of the office establishment would have to be provided for; and therefore the contract with the defendant was not that he should share the profit whatever it might be. On the whole I think it would be going too far to say that the contract was that the defendant should share in the profits and losses of the transactions. But then comes in the principle of the decision, that a contract to employ a *del credere* agent is not within the statute and need not be in writing, because its main object is to regulate the terms of the agent's employment, and, though in the result the agent may have to indemnify the principal against losses, that is not the main object of the contract. The present case, however, is not strictly that of a *del credere* agent, and the question is, whether the exception from the statute which has been established in the case of a *del credere* agent applies to the present case. I can not see any difficulty in holding that it does, when I look at the reasons given by PARKE, B., for the decision in *Couturier* v. *Hastie* (8 Ex. 40), when a man simply agrees to assume liability for the debt of another, he has no interest whatever in the transaction, except by virtue of the guarantee.

In the present case the defendant has an independent interest in the transactions. Another distinction is this, that the contract is one which regulated the terms upon which the defendant was to be employed by the plaintiffs. I agree with BOWEN, L. J., that "this is really a contract which regulates the terms of the agency, and the defendant's liability to answer for the debt of another is only an ulterior consequence of the terms in which the contract is framed." I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Harold A. Farman*,
Eldred & Bignold.

THE FIRST NATIONAL BANK, Respondent, *vs.* CHALMERS *et al.*, Appellants (1895).

144 N. Y. 432; 39 N. E. 331.

Appeal from judgment of the General Term of the Supreme Court in the Second Judicial Department, entered upon an order made at the May Term, 1893, which affirmed a judgment in favor of the plaintiff, entered upon a decision of the Court on trial at Circuit without a jury.

A *mem.* of the case on a former appeal appears in 120 N. Y. 658.

This action was brought upon an alleged agreement made by defendants for a valuable consideration, to pay to plaintiff the amount of an indebtedness of the firm of Charles Spruce & Co. to it.

On October 30, 1882, said firm, being financially embarrassed, confessed judgment to defendants for various sums due them and for amounts owing to other parties. The statement on which the judgment was entered, under the head of "Liabilities assumed," set forth, among other items, the following: "Money due by Charles Spruce & Co. to First National Bank of Sing Sing on overdraw account, $1556.47."

The court found that defendant made an absolute, unconditional promise to pay plaintiff's debt.

Further facts are stated in the opinion.

Calvin Frost, for appellants.

Francis Larkin, for respondent.

FINCH, J. What constitutes an original promise, upon which the Statute of Frauds does not operate, and which therefore may be valid and effectual without a writing, is fairly settled in one direction at least. Wherever the facts show that the debtor has transferred or delivered to the promisor, for his own use and benefit, money or property in consideration of the latter's agreement to assume and pay the outstanding debt, and he, thereupon, has promised the creditor to pay, that promise is original, upon the ground that by the acceptance of the fund or property under an agreement to assume and pay the debt the promisor has made that debt his own, has become primarily liable for its discharge, and has assumed an independent duty of payment irrespective of the liability of the principal debtor. *Ackley* v. *Parmenter,* 98 N. Y. 425; *White* v. *Rintoul,* 108 id. 223. In such a case the debt has become that of the new party promising; his promise is not to pay the debt of another, but his own; as between him and the primary debtor the latter has become practically a surety entitled to require the payment to be made by his transferee. The consideration of the primary debt, by the transfer of the money or property into which that consideration had been in effect merged, may be said to have been shifted over to the new promisor, who thereby comes under a duty of payment as obvious as if original consideration had passed directly to him.

The question before us therefore is whether the promise of the defendants, made to the bank, to pay the debt due it from Leary & Spruce, was founded upon such a transfer of property as I have above described, and thus was original, or whether it was not so founded, and must be for that reason deemed collateral.

We are bound to assume upon the findings that the promise to pay was absolute, and clean of condition or contingency. The question whether it was made at all was severely litigated, and depended upon the conclusion to be drawn from testimony full of violent contradictions, and we are not at liberty to review the determination of fact which affirms that the promise to pay was in truth made, and was absolute in its terms as sworn to by the witnesses on the part of the plaintiff. As to the substance of the agreement between the defendants and the primary debtors, there is also contradiction. The former assert that their assumption of the debt went no further than a consent to pay it out of the proceeds of the debtor's property after the discharge of their own debt, or in other words, that their agreed liability was to pay plaintiff only out of proceeds when realized, and even then out of any possible excess remaining over and above their own debt. If that is true, they were under no present duty to pay the bank when the promise was made; the debt had not become theirs; might never become theirs; and so their verbal promise to the bank was purely collateral and to answer for the debt of another. That proposition was quite distinctly held in *Ackley* v. *Parmenter, supra,* and upon the authority of *Belknap* v. *Bender,* 75 N. Y. 446, which disclosed an agreement simply to pay out of proceeds when realized, and so far as sufficient. On this branch of the case the inquiry turns upon the facts, and the findings fail to disclose any such agrement, but establish the contrary. They determine that for a valuable consideration, and by an agreement with Leary and Spruce, the defendants agreed to pay the plaintiff the debt due to it. This finding is free of any conditions, and imports an absolute agreement to pay at once and in full, and so negatives the defendants' version of the facts. It is sustained by the testimony of the plaintiff's witnesses, and is strongly corroborated by the form of the confession of judgment which the defendants' attorney drew, which they accepted, upon which they issued an execution, and which provides for an assumption of the bank debt absolutely and without condition. All the requisites of an original promise, unaffected by the Statute of Frauds, were thus explicitly embraced in the findings, except one. It is not in terms or expressly found that the consideration, described simply as valuable, was, beyond that, such a consideration as would avoid the statute because it consisted of a transfer to the defendants for their own use and benefit of the debtors' property. That fact is involved in the findings, since it is essential to the legal conclusion, which cannot stand without it. We may look into the evidence, therefore, to see whether it would have sustained such a finding if it had been explicitly made, and thereupon assume the fact in support of the judgment. (*Ogden* v. *Alexander*, 140 N. Y. 356.)

I can find in the proof no express agreement in words transferring the real and personal estate of the firm to the defendants, but that there was such a transfer in fact is abundantly established and beyond any reasonable doubt. The situation appears to have been this. Leary and Spruce were manufacturers of files. The defendants in New York were the regular purchasers at established rates, of their whole product. The manufacturers became seriously indebted to their vendees in the progress of the business, and as security therefor had given to them a mortgage on their real estate for $2,500, dated in 1876, and payable in one year; a second mortgage on the same land for $5,000, dated in April, 1882, and payable in one year; and, as collateral to the last-named security, a chattel mortgage for $5,000 covering all machinery and personal property used in the manufacture of files. The stock on hand and the equity of the mortgagors still remained to them. There was due, or to become due, on these securities about the sum of $7,400 at the date of the final arrangement of October, 1882, assuming that all the debt created prior to their dates was protected by the mortgages. But an added indebtedness, not covered by the securities, had later accrued in the form of two notes and one indorsement, amounting to about $4,200, no part of which had matured on October 30, 1882. On that day the debtors announced to the defendants their inability to pay. Of course the statement created alarm. None of the mortgages secured future advances, and the defendants found themselves unsecured creditors to the amount of over $4,000. The chattel mortgage was not due and contained no danger clause permitting an immediate seizure. The whole stock on hand, manufactured and unmanufactured, was encumbered by no lien, and that and the equity under the mortgages belonged to the debtors, was open to attack and could be disposed of by the firm. They estimated the entire value of their property at $16,000, which was the footing of their last preceding inventory, and claimed it to be sufficient, not only to pay the defendants in full but also the bank and certain other creditors whom they wished to protect. They were talking of an assignment, but assured the defendants that they were ready to give them a bill of sale of all their property, or any other security, provided that the bank and other named creditors were protected. The defendants agreed to assume and pay those debts, and chose instead of a bill of sale to take a confession of judgment. In that the debtors swore that they were justly indebted to the defendants in a sum made up of the total debt to the latter, and of the debts to other named creditors, which the defendants had assumed and agreed to pay. Had the transaction stopped at this point it would be difficult to support the promise to the bank, unless upon the ground of an intended purchase by the defendants of the debtor's assets, the price of which was secured by the confession of judgment. But it did not stop there. The defendants could at once have levied upon the whole personal property, and advertised a sale of the real estate, but all that was needless, because the debtors at once turned over the whole property to the defendants, and put them in entire and complete possession, for their own use and benefit. Leary abandoned it utterly and went away. Spruce remained as the hired servant of the defendants, working for wages which they cut down at their pleasure, obeying their orders, shipping the whole manufactured product to them in New York, drawing on them for the pay roll, and treating the property in all respects as theirs. Not a vestige of it ever came back to the debtors. The latter were willing to transfer it, as their offer of a bill of sale proves; they did transfer it, and in the light of the confession of judgment and the promise to the bank, it is impossible not to see that it was in consideration of an agreement by the defendants to pay the specified debts.

I have not failed to consider the attempted explanation of Chalmers and the argument about it of his counsel. The former sought to put himself in the attitude of a tenant under Spruce as landlord, to claim that his wages of $20 a week were in part for rent, and to show that the goods were sold to him by Spruce as before the failure. But the latter, though unwillingly, controverted the theory, and Chalmers' own version of the facts does not harmonize with the explanation made. The claim that Spruce was to remain owner and work out the debts does not account for Leary's abandonment of the possession, nor Spruce's service for wages, still less for the instant assumption and payment of all expenses and exercise of complete control by the defendants. They took all the products, and if they continued to keep the accounts in the old way it was but a natural measure of convenience in order to separate the factory business from their own, and be able to ascertain its ultimate results. They took the confession of judgment as a guard and protection against other creditors, and as a defense of the transfer made to them. They issued no execution at once because that was needless to attain possession, but did issue it later when their title was threatened. That all this was done upon an understanding and agreement in accord with the facts seems to me a natural and necessary inference.

Nor have I overlooked the fact that the confession of judgment was set aside on the motion of a junior creditor. The defendants' attorney, after a consultation with his clients, accepted short notice of the motion, and then suffered it to be granted by default. The probabilities are that the proceeding was collusive, but if not, it was one of the risks which the defendants assumed and is immaterial to the result.

I have reached my conclusion without reliance upon the previous decision of this court on the first appeal (120 N. Y. 650), and without any reference to the doctrine of *Lawrence* v. *Fox*, which has played some part in the discussion. The opinions of the second division on the former appeal in the case indicate that a majority of the court did not agree upon any one proposition discussed. I should treat that judgment as decisive if it had decided, but the only authoritative determination was the order for a new trial. I do not deem the doctrine of *Lawrence* v. *Fox* involved in this controversy. That doctrine applies where no express promise has been made to the party suing, but he claims the right to rest upon a promise between other parties having respect to the debt due to him and as having been made for his benefit. It struggles to obviate a lack of privity upon equitable principles, but is needless and has no proper application where the privity exists, and a direct promise has been made upon which the action may rest. Here we have the promise, and if it is valid the whole problem is solved.

I think the promise proved and found rested not only upon a valuable consideration, but one of such character as to make the promise original and save it from the condemnation of the Statute of Frauds.

The judgment should be affirmed, with costs.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

MORRIS *et al.* *vs.* OSTERHOUT AND HUGHART (1884).

55 Mich. 262; 21 N. W. 339.

ASSUMPSIT. Defendants bring error. Affirmed.

T. J. O'Brien, for appellants.
Cooper & Winsor, for appellees.

SHERWOOD, J. The plaintiffs, who are millers residing at Reed City, brought their action of assumpsit against the defendants, who are engaged in the lumber business and reside at Grand Rapids, to recover for a quantity of flour and mill-feed, amounting to the sum of $482.92. James H. Carey had a contract with defendants whereby he was to do sawing and make shingles for them at Careyville, in Lake county, where the defendants had a quantity of pine timber. The flour and feed was purchased by Carey and used by him while doing the sawing for defendants, and when he made the purchase he told the plaintiffs that the goods were for the defendants: that he was at work for them, and that they had ordered him to get the goods for them. The plaintiffs seek to hold the defendants liable under the authority, which was verbal, thus claimed to have been given Carey to make the purchase, and a subsequent promise claimed to have been made by Hughart to pay for the goods, which, however, is denied by the latter. The defendants claim that by the terms of their agreement with Carey they were under no obligation to supply the goods or to make advances to Carey, and that they never authorized him to make the purchase on their account.

The questions at the circuit were mostly those of fact, and were submitted to the jury, who, under the rulings and charge of the court, rendered their verdict for the plaintiffs for the amount claimed. The defendants bring error, and the rulings and charge of the court are now before us for review.

At the close of the trial the defendants' counsel asked the court to direct a verdict for the defendants. The request was refused.

We do not think the record presents a case for the instruction asked. Carey swears, in substance, that the defendants gave him authority to make the purchase on their credit, and the credibility of his testimony was for the jury. If he stated truly the direction sworn to by him as coming from defendant Hughart, the jury would be warranted in finding that the defendants authorized the purchase. The promise would be by defendants and not by Carey, and therefore not within the Statute of Frauds. It would be a debt contracted upon their own promise, and not a liability for the debt of another.

It is alleged as error that the court refused to give defendants' second, eighth and ninth requests to charge, which requests were as follows:

"*Second.* If the jury finds from the evidence that the goods were charged, shipped and billed to Carey; that no bill was ever sent to the defendants; that the plaintiffs took an order on the defendants for the amount of the bill, and afterwards presented this order and requested its acceptance and payment, and still retain this order—such evidence is inconsistent with the claim now made by the plaintiffs, and they cannot recover in this action."

"*Eighth.* Under the undisputed facts in this case, it appears that Carey is still liable to the plaintiffs for the amount of the goods in question, and the plaintiffs cannot recover in this action."

"*Ninth.* It is not sufficient for the jury to find that Hughart authorized Carey to buy in their name and upon their credit. They must also find from the evidence that the credit was given to Osterhout and Hughart and not to James H. Carey. And in arriving at a conclusion on this point they should consider all the acts and conduct of the plaintiffs: such as the entry in their books, the shipping of the goods, the taking of the order, their repeated efforts to collect it, and their present possession of it."

The second and eighth requests, we think, were properly refused. The facts stated in the second request exclude the idea that the inconsistency claimed for them is susceptible of explanation, but such is not the law. The eighth request seeks to have the court state what the undisputed facts show. What they show was a question for the jury, and in this case cannot be considered disconnected with the other testimony in the case bearing on the same point.

The circuit judge in his charge stated to the jury that the *first* proposition for the plaintiffs to establish was that Carey was authorized by defendants to purchase the goods for them; and *second*, that plaintiffs, when Carey made the purchase, relied entirely upon defendants, and not upon Carey, for the pay; and if they found in the affirmative of these propositions the plaintiffs would be entitled to recover; if not, the defendants must prevail. He further told them that, in solving these propositions, they must take into consideration all the testimony in the case, including the actions of the parties. We think these charges sufficiently cover the substance of the defendants' ninth request.

We have carefully examined the remainder of the charge excepted to by the defendants' counsel and do not find any error therein. The facts were for the jury, and whether the court below or this court would or would not have come to the conclusion reached upon the testimony is not for our consideration. We find no error in the record committed by the court, and here our duty ends.

The judgment must be affirmed.

The other Justices concurred.

BALDWIN *vs.* HIERS (1884).

73 Ga. 739.

L. S. Baldwin brought suit against Charles Hiers, and John A. Hiers, as guarantor, in a justice's court, on March 22, 1881. The account attached to the summons was in the name of Charles Hiers. The justice entered judgment for the plaintiff, an appeal was entered, the jury found for the plaintiff, and a *certiorari* was sued out by the defendant, John A. Hiers. The evidence for the plaintiff on the trial in the justice's court was that Charles Hiers was the minor son of John A. Hiers; that the latter told plaintiff to let Charles and another son have goods and charge them to the one who purchased them; to let them have goods and he (John A.) would see that the plaintiff got the money for them; and the goods were furnished accordingly.

Defendant, John A., denied any such agreement, or that he owed the account, and testified that the son worked for himself during the year. The son denied the correctness of the account, and asserted that he purchased most of the goods charged, but that some of the account was really for whisky, though charged under other names.

The court sustained the *certiorari* and ordered a new trial. Plaintiff excepted.

T. H. Pickett, by brief, for plaintiff in error.

G. W. Warwick; L. C. Hoyle, by *R. J. Jordan,* for defendant.

Blandford, Justice.

(1) The plaintiff sued the defendant in a justice's court as guarantor, and obtained a verdict in his favor. The evidence showed that the son of the defendant wished to purchase goods from the plaintiff, and the defendant agreed if plaintiff would let defendant's son have the goods he, defendant, would see it paid. This was an original and not a collateral undertaking. If the promise had been that he would pay the debt if his son did not, then such a promise would be void unless reduced to writing; it would be a promise to answer for the debt, default or miscarriage of another; but an undertaking that if plaintiff would let defendant's son have goods, he would see it paid, or would pay it himself, is an original undertaking, founded on a sufficient consideration, and is good and binding on defendant.

(2) And the defendant being sued in a justice's court as guarantor would make no difference, as there are no pleadings in that court.

(3) We think the evidence was sufficient to sustain the verdict and judgment in the justice's court, and would have been satisfied if the court below had allowed the same to stand, but as the court thought proper to reverse and set aside the judgment of the justice's court, we will not interfere, as this is equivalent to the first grant of a new trial. The court below is nearer the parties and witnesses than we are. The testimony is conflicting, and we will let the judgment of the court below stand.

Judgment affirmed.

Mead, Mason & Co. *v.* Watson (1885).

57 Vt. 426.

Assumpsit. Heard on a referee's report, December Term, 1884, Taft, J., presiding. Judgment for the plaintiffs. The referee found, that the plaintiffs were dealers in doors, windows, and materials for house furnishing; that the defendant, who was known to be responsible, introduced Cameron to the plaintiffs; that the house, for which the articles were purchased, was situated on the defendant's land; that the understanding was, that when the house was completed, it was to be deeded to Cameron's wife; that Cameron abandoned the house before it was completed, and it was finished by the defendants, who retained the title; that the defendant's contract with the plaintiffs was by parol. The other facts are sufficiently stated in the opinion.

S. M. Pingree, for the plaintiffs.

T. O. Seaver, for the defendant.

The opinion of the court was delivered by

POWERS, J. The referee says the plaintiffs understood "that whatever Cameron ordered for said house for the plaintiffs the defendant would guarantee the payment of," and the plaintiffs "would not have sold said articles to Cameron except for this understanding, that the payment was guaranteed by the defendant." Later on he says, "Those articles were all charged to Cameron on plaintiffs' books; and plaintiffs understood that they were to collect the same of said Cameron, if possible, and that the defendant was only liable to pay the same in case the plaintiffs were unable to make collections of Cameron.

The contract of the defendant therefore was collateral to the contract of Cameron.

It is true that no debt existed against Cameron when the defendant's promise was made. But the defendant only promised to be responsible for a *future* debt. His promise could only attach to the principal obligation of Cameron, when that obligation came into force. The defendant did not promise to pay primarily, but only in case the plaintiff failed to collect of Cameron.

If the future primary liability of a principal is contemplated as the basis of the promise of a guarantor, such promise is within the Statute of Frauds, precisely as it would be if the liability existed when the promise was made. Brandt, Sur., § 61; Browne, St. Fr., § 162; *Matson* v. *Wharam,* 2 Term, 80.

Judgment reversed, and judgment on the report for defendant.

JONES, Appellant, *vs.* BACON, as Surviving Executor, etc., Respondent (1895),

145 N. Y. 446; 40 N. E. 216.

Appeal from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 3, 1893, which denied a motion for a new trial and ordered judgment in favor of defendant entered upon an order non-suiting plaintiff.

This action was brought to recover damages for a breach of an oral contract alleged to have been made by James McKechnie, defendant's testator, to indemnify him in case of his indorsement of certain notes made by one Kingsbury.

Upon the trial plaintiff called Kingsbury as a witness to prove the alleged promise. His testimony on that subject was objected to by defendant's counsel on the ground that the witness was incompetent to testify in regard thereto under section 829 of the Code of Civil Procedure. Plaintiff thereupon produced and proved and gave in evidence an instrument executed by plaintiff under seal, by the terms of which, in consideration of the sum of one dollar, he released Kingsbury from "all liability, responsibility or damages" sustained or which might thereafter be sustained by him by reason of his indorsement. This release was by an amended answer set up as a defense.

The further material facts are stated in the opinion.

William H. Smith, for appellant.

Henry M Field and *Frank Rice,* for respondent.

ANDREWS, Ch. J. The oral promise of the defendant's testator to the plaintiff was, in substance, a promise of indemnity in case the plaintiff would become indorser on the note of Kingsbury to the banking firm of McKechnie & Co. for a debt of Kingsbury to the bank. The plaintiff thereupon indorsed the note of Kingsbury to the bank, and has been compelled to pay thereon the sum of about $16,000, Kingsbury having made default and being insolvent. This is a statement of the facts in the simplest form, and the question arises whether the oral promise by the defendant's testator to indemnify the plaintiff was void under the Statute of Frauds, as being a promise to "answer for the debt, default or miscarriage of another person." (2 Rev. St. 135, Sec. 2, Sub. 2.) This is no longer an open question in this state. It was decided in *Chapin* v. *Merrill*, 4 Wend. 657, that a promise by one person to indemnify another for becoming a guaranty for a third is not within the statute and need not be in writing, and that the assumption of the responsibility was a sufficient consideration for the promise. The doctrine of *Chapin* v. *Merrill* was approved in *Mallory* v. *Gillett*, 21 N. Y. 412, in *Sanders* v. *Gillespie*, 59 id. 250, and *Tighe* v. *Morrison*, 116 id. 263, and in other cases in this court. The same doctrine now prevails in the English courts. *Thomas* v. *Cook*, 8 Barn. & C. 728; *Reader* v. *Kingham*, 13 Com. Bench, N. S. 344; *Wildes* v. *Dudlow*, L. R. 19 Eq. Cas. 198. We do not deem it proper to reopen the discussion or to refer to cases where a different view has prevailed. The court below considered the subject at large, and the able opinion of BRADLEY, J., refers to many of the cases on the subject.

The plaintiff was, therefore, entitled to maintain an action except for his act in releasing Kingsbury from his liability for the money he was compelled to pay on account of the indorsement. The release was probably essential in order to enable the plaintiff to make any proof of the agreement for indemnity, since he could establish the promise only by Kingsbury, the plaintiff himself not being a competent witness by reason of the death of the promisor McKechnie, and there being no other person cognizant of the transaction. By the release Kingsbury was discharged from all responsibility to the plaintiff. The plaintiff having paid the debt in part out of his property, could, prior to the release, have maintained an action against Kingsbury to recover the sum so paid. *Butler* v. *Wright*, 20 Johns, 367; *Hunt* v. *Amidon*, 4 Hill, 345. The indemnitor of the plaintiff, on restoring to him this sum in performance of the contract of indemnity, would be entitled to be substituted to the claim of the plaintiff against Kingsbury. This stands upon the most obvious principles of natural justice. The money paid by the plaintiff was at the request of Kingsbury, implied from the legal liability as indorser assumed by him, and Kingsbury was bound to reimburse the plaintiff. But, by an independent contract between the plaintiff and his indemnitor, McKechnie, the latter was also bound to save the plaintiff harmless. On performance of this obligation by the indemnitor, he would be entitled to stand in the shoes of the plaintiff as to his right to call upon Kingsbury. By equitable substitution the indemnitor would take the right which the plaintiff had against Kingsbury. There was no privity of contract between the indemnitor and Kingsbury, but there was between the plaintiff and Kingsbury. On paying the plaintiff what he had been compelled to pay for Kingsbury, pursuant to the contract of indemnity, the indemnitor would stand as the equitable assignee of the plaintiff of the obligation of Kingsbury to him. Kingsbury had no equity to be relieved from his obligation, because the plaintiff had recourse against McKenzie. The plaintiff, though not strictly such, had the equities of a surety against Kingsbury, and the equities by operation of law would pass to McKechnie on his performing his contract of indemnity, except for the release. The release of Kingsbury by the plaintiff materially changed the rights and remedies of the defendant against Kingsbury. It barred any claim against Kingsbury in behalf of the estate of the indemnitor, to recover as the representative of the rights of the plaintiff against him, in case the plaintiff should prevail in the action. Such an interference plainly operates to discharge the estate of the indemnitor

Upon the ground that the release defeated the right of action, the judgment should be affirmed.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

HARTLEY *vs.* SANDFORD (1901).

66 N. J. L. 627; 55 L. R. A. 206; 50 Atl. 454.

Error to the Supreme Court to review a judgment in favor of plaintiff in an action brought to enforce a promise to indemnify plaintiff for payments which he had been compelled to make as a surety for defendant's son. Reversed.

The facts are stated in the opinion.

Mr. John B. Humphreys, for plaintiff in error.

Mr. Zebulon M. Ward, for defendant in error.

DIXON, J., delivered the opinion of the court.

The material facts in this case, as disclosed by the record, are that the defendant's son was indebted to M., who desired additional security; that thereupon the defendant applied to the plaintiff to become surety for the son, and promised him that, if he was compelled to pay the debt, he (the defendant) would reimburse him; that accordingly the plaintiff became surety for the son, and subsequently was obliged to pay the debt. This suit was brought upon the promise, which was oral only. It appears that at the trial in the Passaic circuit the jury were instructed to find for the plaintiff if they were satisfied the promise had been made; but the question as to the legal sufficiency of the promise was reserved and certified to the supreme court, which afterwards advised the circuit that the promise was valid, and thereupon judgment was entered on the verdict.

In this court error has been assigned on the charge at the circuit, as well as on the advisory opinion of the supreme court; but, there being no bill of exceptions presenting the charge, the assignment of error respecting it is futile, and must be disregarded. The assignment upon the opinion of the supreme court is legal, and presents the only question now before us, which is whether the plaintiff's suit can be maintained, in view of our statute, "that no action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the person to be charged therewith or some other person thereunto by him or her lawfully authorized." The advice of the supreme court was based upon its opinion that under the adjudications in this state the promise of one person to indemnify another for becoming surety of a third is not within the statute. The cases cited in that opinion to support this view are *Apgar* v. *Hiler*, 24 N. J. L. 812; *Cortelyou* v. *Hoagland*, 40 N. J. Eq. 1; and *Warren* v. *Abbett* (N. J. L.) 46 Atl. 575. Of these, the only one of controlling authority here is that of *Apgar* v. *Hiler*, which is a decision of this court. That decision does not sustain the broad proposition for which it was cited. This court there held merely that, between two persons who had signed the same promissory note as sureties for another signer, the oral promise of one surety to indemnify the other was valid. This promise was deemed outside of the statute, because by signing the note the promisor had himself become a debtor, and so his promise to indemnify was to answer for his own debt. In *Cortelyou* v. *Hoagland* several stockholders and directors of a corporation had promised to indemnify another stockholder and director for indorsing a corporate note, and *Warren* v. *Abbett* was of similar character. In the *Cortelyou Case* the chancellor rested his decision on *Apgar* v. *Hiler,* which, as above stated, was essentially different, and on *Thompson* v. *Coleman,* 4 N. J. L. 216, which was a promise to indemnify a constable for selling under execution goods claimed by an outside party,—a case where the promisee had no redress except on the promise, and therefore clearly outside of the statute. If the decisions in *Cortelyou* v. *Hoagland* and *Warren* v. *Abbett* are to be supported on prior New Jersey adjudications, such support must be found in the doctrine that where the consideration of a promise to answer for the debt, default, or miscarriage of another is a substantial benefit moving to the promisor, then the statute does not apply. This rule was recognized in *Kutzmeyer* v. *Ennis,* 27 N. J. L. 371, and *Cowenhoven* v. *Howell,* 36 N. J. L. 323. To support those decisions on this rule, it must be held that the payment of a corporate debt is substantially beneficial to the stockholders or directors of the corporation,—a proposition which seems to be denied in other tribunals. Browne, Stat. Fr. § 164. In the promise now under consideration there was no such element, and no case has been found in our Reports involving the present question. We should therefore decide the matter on principle, or as nearly so as related adjudication will permit. Looked at as *res nova,* it seems indisputable that the defendant's promise was within the statute. It was to respond to the plaintiff in case the defendant's son should make default in the obligation which he would come under to the plaintiff as soon as the plaintiff became surety for him,—an obligation either to pay the debt for which the plaintiff was to be surety, or to reimburse the plaintiff if he paid it. In this statement of the nature of the promise there is, I think, every element which seems necessary to bring a case within the purview of the statute. The parties, in giving and accepting the promise, contemplated (1) an obligation by a third person to the promisee; (2) that this obligation should be the foundation of the promise, *i. e.,* that the obligation of the son to the promisee should attach simultaneously with the suretyship of the plaintiff, and thereupon should arise the obligation of the promisor for the fulfillment of the son's obligation; and (3) that the obligation of the promisor should be collateral to that of the son, *i. e.,* if the latter should perform his obligation, the promisor would be discharged, while, if the promisor was required to perform his obligation, that of the son would not be discharged, but only shifted from the promisee to the promisor. An examination of the cases will show that not many of them are in conflict with this view, when they are free from differentiating circumstances. In the leading case of *Thomas* v. *Cook*, 8 Barn. & C. 728, such a circumstance appears in the fact that the promisor was himself a signer of the bond against which he promised to indemnify the promisee, and thus the promise was, in a reasonable sense, to answer for that which, as to the promisee, was the promisor's own debt. On this difference may be explained the decisions in *Jones v. Letcher*, 13 B. Mon. 363; *Horn* v. *Bray*, 51 Ind. 555, 19 Am. Rep. 742; *Barry* v. *Ransom*, 12 N. Y. 462; *Sanders* v. *Gillespie*, 59 N. Y. 250; *Ferrell* v. *Maxwell*, 28 Ohio St. 383, 22 Am. Rep. 393; and others,—resting on the rule applied in *Apgar* v. *Hiler*, 24 N. J. L. 812. The remark of Bayley, J., in *Thomas* v. *Cook*, that a promise to indemnify was not within either the words or the policy of the statute, has caused much of the confusion existing on this subject, but is more than counterbalanced by the observations of Lord Denman in *Green* v. *Cresswell*, 10 Ad. & El. 453, and Pollock, C. B., in *Cripps* v. *Hartnoll*, 4 Best & S. 414, to the effect that a promise to indemnify may be also an undertaking to answer for the debt or default of another, and that when it is it comes within the operation of the statute. Another circumstance taking cases out of the simple class with which we are now concerned is that mentioned in *Kutzmeyer* v. *Ennis*, 27 N. J. L. 371, 376, viz., the existence of a new consideration beneficial to the promisor, or, as it is sometimes expressed, moving to the promisor. Such cases are *Smith* v. *Sayward*, 5 Me. 504; *Lucas* v. *Chamberlain*, 8 B. Mon. 276; *Mills* v. *Brown*, 11 Iowa, 314; *Reed* v. *Holcomb*, 31 Conn. 360; *Smith* v. *Delaney*, 64 Conn. 264, 29 Atl. 496; *Potter* v. *Brown*, 35 Mich. 274; *Comstock* v. *Norton*, 36 Mich. 277; *Harrison* v. *Sawtell*, 10 Johns. 242, 6 Am. Dec. 337; *Sanders* v. *Gillespie*, 59 N. Y. 250; *Tighe* v. *Morrison*, 116 N. Y. 263, 5 L. R. A. 617, 22 N. E. 164. Cases of still another character are sometimes cited in support of the statement that contracts to indemnify are outside of the statute, such as *Cripps* v. *Hartnoll*, 4 Best & S. 414; *Reader* v. *Kingham*, 13 C. B. N. S. 344; *Anderson* v. *Spence*, 72 Ind. 315, 37 Am. Rep. 162; *Keesling* v. *Frazier*, 119 Ind. 185, 21 N. E. 552; *Beaman* v. *Russell*, 20 Vt. 205, 49 Am. Dec. 775. But these judgments rest on the same idea as *Thompson* v. *Coleman*, 4 N. J. L. 216,—that there existed no other liability to the promisee than that of the promisor, and so manifestly the statute was not applicable. On the other hand, there is sufficient judicial authority for the proposition that an undertaking to indemnify a person for becoming surety for another is, in the absence of any modifying fact, a promise within the statute. *Green* v. *Cresswell,* 10 Ad. & El. 453; *Simpson,* v. *Nance,* 1 Speers, L. 4; *Brown* v. *Adams,* 1 Stew. (Ala.) 51, 18 Am. Dec. 36; *Kelsey* v. *Hibbs,* 13 Ohio St. 340; *Clement's Appeal,* 52 Conn. 464; *Bissig* v. *Britton,* 59 Mo. 204, 21 Am. Rep. 379; *Nugent* v. *Wolfe,* 111 Pa. 471, 56 Am. Rep. 291, 4 Atl. 15; *Draughan* v. *Bunting,* 31 N. C. (9 Ired. L.) 10; *Hurt* v. *Ford,* 142 Mo. 283, 41 L. R. A. 823, 44 S. W. 228; and *May* v. *Williams,* 61 Miss. 126, 48 Am. Rep. 80,—were decided on this basis. In the case last mentioned, COOPER, J., stated the true rules very clearly and concisely. No doubt, there are opposing cases which cannot be explained on any distinguishing circumstances. Such seem to be *Chapin* v. *Merrill,* 4 Wend. 657; *Jones* v. *Bacon,* 145 N. Y. 446, 40 N. E. 216; *Dunn* v. *West,* 5 B. Mon. 376; *Vogel* v. *Melms,* 31 Wis. 306, 11 Am. Rep. 608; and *Wildes* v. *Dudlow,* L. R. 19 Eq. 198. But some of these cases merely follow *Thomas* v. *Cook,* 8 Barn. & C. 728, without noticing the distinction which later discussion has justified, while others appear to have been induced by the injustice of a refusal to enforce a promise on the strength of which the promisee incurred his liability, rather than by a ready purpose to execute the will of the legislature.

No doubt, injustice may result fom the enforcement of the statutory rule; but that rule sprang from a conviction that its adoption would prevent more wrong than it would permit, and its enactment in England and perhaps every state in this Union indicates the generality of this assurance. Said Mr. Justice Sterrett in *Nugent* v. *Wolfe,* 111 Pa. 471, 56 Am. Rep. 291, 4 Atl. 15: "The object of the statute is protection against 'fraudulent practices commonly endeavored to be upheld by perjury,' and it should be enforced according to its true intent and meaning, notwithstanding cases of great hardship may result therefrom." With more detail did Chief Justice Shaw, in *Nelson* v. *Boynton,* 3 Metc. 396, 37 Am. Dec. 148, say: "The object of the statute, manifestly, was to secure the highest and most satisfactory species of evidence in a case where a party, without apparent benefit to himself, enters into stipulations of suretyship, and where there would be great temptation on the part of a creditor, in danger of losing his debt by the insolvency of his debtor, to support a suit against the friends or relatives of a debtor,—a father, son, or brother,—by means of false evidence, by exaggerating words of recommendation, encouragement to forbearance, and requests for indulgence into positive contracts."

Our conclusion is that the promise proved at the trial was insufficient to sustain the action, that *the judgment for the plaintiff should be reversed*, and that, in accordance with the reservation at the trial, a verdict and judgment should be entered in favor of the defendant.

EASTWOOD *vs.* KENYON (1840).

11 Adol & El. 438; 39 E. C. L. 245.

In this term, (January 16th,) the judgment of the court was delivered by

Lord DENMAN, C. J. The first point in this case arose on the fourth section of the Statute of Frauds, viz., whether the promise of the defendant was to "answer for the debt, default, or miscarriage of another person." Upon the hearing we decided, in conformity with the case of *Buttemere* v. *Hayes,* 5 Mee. & W. 456, that this defense might be set up under the plea of Non Assumpsit.

The facts were that the plaintiff was liable to a Mr. Blackburn on a promissory note; and the defendant, for a consideration, which may for the purpose of the argument be taken to have been sufficient, promised the plaintiff to pay and discharge the note to Blackburn. *If the promise had been made to Blackburn,* doubtless the statute would have applied: it would then have been strictly a promise to answer for the debt of another; and the argument on the part of the defendant is, that it is not less the debt of another, because the promise is made to that other, viz., the debtor, and not to the creditor, the statute not having in terms stated to whom the promise, contemplated by it, is to be made. But upon consideration we are of opinion that the statute applies only to promises made to the person to whom another is answerable. We are not aware of any case in which the point has arisen, or in which any attempt has been made to put that construction upon the statute which is now sought to be established, and which we think not to be the true one.[1]

Rule to enter verdict for defendant discharged.

ALGER *vs.* SCOVILLE (1854).

1 Gray (Mass.) 391.

ASSUMPSIT. The facts are sufficiently stated in the opinion.

C. N. Emerson (*I. Sumner* was with him), for the defendant.

D. D. Field (of New York) and *J. E. Field*, for the plaintiff.

SHAW, C. J. In order to have a clear view of the question discussed in the present case, which is assumpsit on a special promise, made by the defendant, it is necessary to understand precisely the facts on which it arises. It appears that when the contract was made, of which the promise sued on was a part, the plaintiff, being the owner of 145 shares in the capital stock of an incorporated company, known as the Duchess County Iron Co., being a major part of the whole stock, and the defendant being the owner of a farm in Monroe county, N. Y., with the stock thereon, the parties agreed to make an exchange of property. At the same time plaintiff held a promissory note against the Duchess County Iron Co. for $3,350, and had indorsed the notes of the Company, which had been discounted at various banks and the money received thereon, to the amount of about $4,000, which would all come to maturity and fall due within four months from the time of the contract. The agreement was that the plaintiff should assign and transfer his shares in the stock of the Company, and also indorse over his note against them to the defendant, and that the defendant should, by a good warranty deed, convey the farm in Monroe county, with the stock thereon, to the plaintiff, and indemnify the plaintiff and save him harmless against his said endorsements. This was one entire contract for one entire consideration, the transfer of the shares and the company's note to the defendant, on the one side, being a consideration for the conveyance of the farm and the promised indemnity by the defendant to the plaintiff, on the other. This contract was executed as far as it could be at the time, by the transfer of the shares and the delivery of the note to the defendant, and a conveyance of the farm and stock by the defendant to the plaintiff; but the promise to indemnify the plaintiff against the notes then outstanding was something to be done in future, and was necessarily executory. Afterwards, when the notes outstanding at banks became due, the plaintiff was called on, as indorser, to pay them, and paid them accordingly; and this action is brought on the defendant's promise to indemnify him and save him harmless from his liability on these notes.

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[1] Everything except the opinion on the one point is omitted.

The ground of defense is, that this was a promise to pay the debt of another, and so, by force of the Statute of Frauds, no action can be maintained upon it unless proved by a promise in writing, signed by the party promising. This is the question.

The precise provision in our statute is as follows: "No action shall be brought to charge any person upon any special promise to answer for the debt, default or misdoings of another, unless the promise, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." Rev. Sts. c. 74, § 1. This enactment is in nearly if not precisely the same terms with that of 29 Car. 2 c. 3; so that adjudications on the construction of the one apply with equal force to the other.

It is not objected that the case is within the other branch of the Statute of Frauds, on the ground that it was part of one entire transaction, a part of which was for the conveyance of real estate, and on that account the promise could not be given in evidence to support an action, not being in writing. All that part of the contract, looking to the conveyance of real estate, having been executed, it stood only as a consideration for the executory undertaking relied on in support of this action; and no part of the contract remains unperformed, except the defendant's promise to indemnify the plaintiff against the payment of the outstanding note, which is the subject of this suit.

In regard to the clause of the statute relied on, the court are of the opinion that the promise is in no sense, in which these terms are used in the Statute of Frauds, a promise to pay the debt of another; but it is a promise to the plaintiff, on a consideration moving from the plaintiff to the defendant, to indemnify the plaintiff against a contingent liability, which he is under, as indorser, to certain banks, to pay certain notes given by the Duchess County Iron Co. as promisors, if they should fail to pay them at maturity. The Iron Company were not then indebted to the plaintiff, nor would they become indebted to him, until the happening of the contingency of their not paying the notes, and his being called on to pay them.

There being no debt due to the plaintiff from the Iron Company or anybody else, on account of those notes, the promise of the defendant was not a suretyship or guaranty, or responsibility to the plaintiff for any debt or duty due to him, but a mere contract of indemnity against a possible liability. Suppose, instead of a contingent liability, it had been an absolute one, a debt due from himself to a third person, a promise to him, made by a third person, on a valuable consideration moving from him, to pay that debt and save the plaintiff harmless, is not a promise to pay the debt of another, but a promise to pay the plaintiff's own debt, which is equivalent to a promise to pay the money to him, by which he himself could discharge the debt. The promise of the defendant to the plaintiff was, that he should not be called on as indorser to pay the notes, and to save him harmless from such call; and the promise was broken, and the cause of action accrued, when the defendant failed to take up the notes of the Company as they fell due, and permitted the plaintiff to be called on and compelled to pay them.

In a case in the Queen's Bench, comparatively recent, the Court say: "We are of opinion that the statute applies only to promises made to the person to whom another is answerable." *Eastwood* v. *Kenyon*, 11 Ad. & El. 446, and 3 P. & Dav. 282.

The same principle has been adopted in several cases in this commonwealth.

A promise to pay the public taxes which may be levied on an estate sold by A to B, made by the seller, as one of the terms of sale, need not be in writing, not being a promise by A to B to pay a debt due to B from another person, but to pay a sum which would otherwise be a charge upon the promisee. *Preble* v. *Baldwin*, 6 Cush. 552.

The distinction between the common case, where the promise is designed to secure the debt of another person to the promisee and so a guaranty, and where the promise is made for another and different purpose, is stated, and the cases on the subject are cited, in *Nelson* v. *Boynton*, 3 Met. 396.

That the promise to one to pay his due debt, a debt due from him to another, is not within the Statute of Frauds, and need not be in writing, was decided in *Pike* v. *Brown,* 7 Cush. 136.

(2) But there is another ground on which we are of opinion that this promise was not within the Statute of Frauds, supposing it could be construed to be a promise, the effect of which if performed would amount to a guaranty that the Iron Company, as promisors on the outstanding notes, should pay those notes, and so save the plaintiff from his liability thereon as indorser, and so, although not a promise to pay the debt of another, yet it might be construed to be a special promise to answer for the default of another, to-wit: the Iron Company.

From the earliest period after the statute was passed in England, the judicial construction there, has been, not merely that there must be a good consideration (that is required by the common law to give legal effect to all contracts); but to require the higher species of evidence, that of writing, where guaranty or suretyship has been the leading or apparent object. But it has been held at the same time that when the leading and obvious object of the promisor was to induce the promisee to forego some lien interest, benefit or advantage, held by him, and to transfer that interest, or confer that or some equivalent benefit on the promisor, although the effect may be to discharge another person from an obligation, still it is a new, independent and original contract between the parties, and is not within the Statute of Frauds required to be in writing. The leading case is *Williams* v. *Leper,* 3 Burr. 1886, where the landlord, having a lien on his tenant's goods for arrears of rent, which goods had been assigned, and were about to be sold by the assignees, entered to distrain, when the broker and agent promised the landlord to pay him his rent if he would forbear distraining. Though the effect would be to discharge the debt of the tenant, it was held not to be within the Statute of Frauds requiring a note in writing. To the same effect is *Castling* v. *Aubert,* 2 East. 325.

This doctrine is fully sustained by the New York cases. It is the third class of cases mentioned by Kent, C. J., in *Leonard* v. *Vredenburgh,* 8 Johns. 39. This third class of cases is, "when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties." This class is not within the Statute.

This point is confirmed and the cases are fully reviewed by SAVAGE, C. J., in *Farley* v. *Cleveland,* 4 Cow. 432.

The same doctrine is recognized in this commonwealth. The case of *Nelson* v. *Boynton,* 3 Met. 402, after stating the distinction is summed up thus: "That cases are not considered as coming within the Statute, when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself; but where the object of the promise is to obtain a release of the person or property of the debtor, or other forbearance or benefit to him, it is within the Statute." One of the last cases on the subject substantially affirms the same principles. *Curtis* v. *Brown,* 5 Cush. 488.

Supposing this rule to be well established, we are then to look at the facts of the present case to see whether it applies.

We have already stated, that we consider the whole as one entire transaction, the conveyance of the farm and the promise of indemnity by the defendant, on the one side, were the consideration of the transfer of shares in the Iron Company and the assignment of the note due the plaintiff from the Iron Company, on the other. Then, what were the relations of the parties before and after the making of this contract? The plaintiff previously was the beneficial owner of more than one-half of the entire property and capital of the company, and the only two other shareholders held together an amount of the stock less than that held by the plaintiff. I believe it was stated in the argument that the plaintiff was president, treasurer or principal manager of the affairs of the company. But this is not material. His large interests would give him a large influence, if not a controlling power, over the funds and affairs of the company, and whilst holding such interest, he would have a powerful voice, if not a decisive direction, in seeing that the funds of the company should be applied to the payment of its notes, of which he was indorser. Is it to be supposed that, acting on ordinary motives, he would put his power entirely out of his control, and yet leave himself liable to the payment of these notes, as their indorser?

Again; the evidence shows, to use the significant figure of the witnesses, that in regard to the Iron Company the defendant was to step into the plaintiff's shoes. Was he to take the plaintiff's large interest in the stock and property of the Iron Company, constituting a natural fund out of which these indorsed notes were to be paid, without taking it subject to the incumbrances? Paying the debts of the company, after the defendant had become a shareholder of more than half, would in effect, and to the extent of his interest in those shares, inure to his own direct benefit.

We are therefore of opinion, that this was a new and original contract between these parties, originating in a new consideration moving from the plaintiff to the defendant, in effect placing the funds in the hands of the defendant, out of which these notes, in due course of business, would be expected to be paid. The promise was part of a larger transaction constituting an entire contract, and we have no reason to believe, and have no authority to declare, that the plaintiff would have parted with his interest in the company without a simultaneous obligation to be indemnified against his liabilities for the company. For these reasons, we are of opinion that this promise was not within the statute, and that an action will lie upon it, though not made in writing.

(3) It was urged, on the part of the defendant, that this promise of indemnity against the outstanding notes was without consideration, because the exchange of property was effected independent of this promise, and that the promise was subsequent and gratuitous.

We have again recurred to the facts stated in the report, and can perceive in them no color for such an argument. Both witnesses speak of it as one bargain, made at one time, and executed as far as it could then be executed. One of them says, the bargain then made was, that Scoville was to take the interest Alger had in the Company, saving him harmless from all liability, or, in other words, to step into his shoes, as far as Alger was in any way interested in the Company; the indorsed outstanding notes were referred to, and it was then agreed between the parties that Scoville was to pay and take up all said notes as they severally fell due. Another witness, present at the same time, testified to the same facts. The use of the present participle, "saving him harmless," immediately after the words "taking his interest in the company," couples the two things inseparably together as one bargain. The one was a consideration for the other. It was a material and essential part of the entire contract, for which the transfer of the shares and the assignment of the company's note were the consideration. The court are therefore of opinion, that the instruction given to the jury was right, and that judgment be entered upon the verdict for the plaintiff.

Judgment on the verdict.

Buckmyr *vs.* Darnall (1704).

2 Lord Raymond 1085; 5 Mod. 248; Salk. 27; 3 Salk. 15; Holt 606.

An action upon the case wherein the plaintiff declared that the defendant, in consideration the plaintiff, at his request *locaret et deliberaret cuidam* Josepho English a gelding of the plaintiff's *ad equitandum et itinerandum usque ad* Reading *in comitatu* Berks, *assumpsit et promisit* the plaintiff, *quod* the said Joseph and Charles the said gelding to the plaintiff *redeliberarent,* etc. Upon *non assumpsit* pleaded, this cause came to trial before Holt, Chief Justice, at Westminster Hall; and the counsel for the defendant insisting that the plaintiff ought to produce a note in writing of this promise, within the statute of frauds, 29 Car. 2, c. 3, s. 4; and the Chief Justice doubting of it, a case was made of it and ordered to be moved in court, to have the opinion of the other judges. And now it was argued this term by *Sergeant Darnall* for the defendant and *Mr. Raymond* for the plaintiff. And it was insisted for the defendant that this case was within the statute of frauds, 29 Car. 2, c. 3, s. 4, for it was a promise to answer for the default and miscarriage of the person the horse was lent to. The very letting out and delivery of the horse to English implies a contract by English to re-deliver him, and he is bound by law so to do, and consequently the defendant is to answer for the default of another. In a case, 2 Will. & Mar., your Lordship settled this rule, that where an action will lie against the party himself, there an undertaking by J. S. is within the statute; and where no action will lie against the party himself, there it is otherwise. And therefore I agree this case, that a man should say to another, "Do you build a house for J. S. and I will pay you," that case is not within the statute, because there J. S. is not liable. But this case is not more than this, if a man should say, "Do you let J. S. have goods, and if he does not pay you I will," and this is within the statute, because an action will lie against J. S. for the money for the goods. Or, if a man should say, "Take J. S. into your service, and if he does not serve you faithfully, or if he wrongs you, I will be responsible," that is also within the statute.

To this it was answered for the plaintiff, that here the credit was wholly given to the pefendant; that, that rule of the sergeant's must be understood, where an action does or does not lie against the party himself on the contract, and not where an action does or does not lie against him upon collateral respects. And therefore in this case, for an actual conversion, or for refusing to redeliver the horse, English may be charged in trover or detinue, yet, he being not chargeable upon the contract, the case is not within the statute. This contract cannot be said properly to be a promise to answer for the default or miscarriage of another, unless English were liable by the first contract.

Upon the first motion and arguing this case, the three judges against Powys seemed to be of opinion that this case was not within the statute, because English was not liable upon the contract; but if any action could be maintained against him, it must be for a subsequent wrong in detaining the horse, or actually converting it to his own use. And POWELL, Justice, said that that rule, of what things shall be within the statute, is not confined to those cases only, where there is no remedy at all against the other, but where there is not any remedy against him on the same contract. This case is just like the case where a man says, "Send goods to such a one, and I will pay you," that is not within the statute, for the seller does not trust the person he sends the goods to. So here the stablekeeper only trusted the defendant, and an action on the contract will not lie against English, but for a tort subsequent he may be charged in detinue, or trover and conversion, which is a collateral action.

POWYS, Justice, said that there was a trust to English, for the very lending of the horse necessarily implies a trust to the person he is lent to, and consequently the defendant in this case is to answer for the default of another, and is within the statute.

POWELL, Justice, agreed, that if a man should say, "Lend J. S. a horse, and I will undertake he shall pay the hire of it," or, "Send J. S. goods, and I will undertake he shall pay you," that those cases would be within the statute; and agreed with POWYS, that if any trust were given to English, then the case would be within the statute. But he and the Chief Justice and GOULD held, that here was no credit given to English, and the Chief Justice agreed with him, that if there had, this promise would have been but an additional security, and within the statute. And the Chief Justice said, that if a man should say, "Let J. S. ride your horse to Reading, and I will pay you the hire," that is not within the statute, no more than if a man should say, "Deliver cloth to J. S., and I will pay you." He said also, that a bailee of an horse for hire is not bound to re-deliver him at all events, but if he be robbed of him without fraud in him, he is excused. And so it was ruled in the case of *Coggs* v. *Bernard,* 2 Stra. 916.

The last day of the term the Chief Justice delivered the opinion of the Court. He said that the question had been proposed at a meeting of judges, and that there had been a great variety of opinions between them, because the horse was lent wholly upon the credit of the defendant; but that the judges of this court were all of opinion that the case was within the statute. The objection that was made was, that if English did not re-deliver the horse, he was not chargeable in an action upon the promise, but in trover or detinue, which are founded upon the tort, and are for a matter subsequent to the agreement. But I answered that English may be charged on the bailment in detinue on the original delivery, and a detinue is the adequate remedy, and upon the delivery English is liable in detinue, and consequently this promise by the defendant is collateral, and is within the reason and the very words of the statute; and is as much so as if, where a man was indebted, J. S., in consideration that the debtee would forbear the man, should promise to pay him the debt, such a promise is void unless it be in writing. Suppose a man comes with another to a shop to buy, and the shopkeeper should say, "I will not sell him the goods unless you will undertake he shall pay me for them," such a promise is within the statute; otherwise, if a man had been the person to pay for the goods originally. So here detinue lies against English the principal; and the plaintiff having this remedy against English the principal, cannot have an action against the defendant the undertaker, unless there had been a note in writing.

MEASE *vs.* WAGNER (1821).

1 McCord (S. Car.) 395.

This was an action for the articles furnished the funeral of Mrs. Bradley, at the request and by order of the defendant. Mrs. Bradley was the widow of Dr. Bradley, who left her his estate during life, remainder to his nephew, John Bradley. Mrs. Bradley, prior to her death, expressed a wish to be buried in a particular manner. As soon as she expired, the defendant was sent for as a friend of the family, and she undertook to procure the articles necessary to such a funeral as the deceased had desired. She proceeded to the shop of the plaintiff, where she selected the articles required, saying they were for Mrs. Bradley's funeral. She was asked "by whom they were to be paid for?" She replied, "charge them to the estate of Dr. Bradley, and as soon as his nephew comes to town he will pay for them, or I will." The articles furnished were such as were suitable to the condition in which Mrs. Bradley had lived.

On the arrival of the nephew in the city, the account was presented to him, and he refused to pay it, saying that the defendant had no authority to procure the articles at his expense. The defendant was then applied to, and she refused payment. Some time after this refusal, one of the witnesses remonstrated with the nephew on the impropriety of his conduct, when he said he would pay it, but did not. It appeared that a Miss Teabout administered upon the estate of Mrs. Bradley.

The counsel for the defendant contended that she was not responsible, as it was a collateral and not an original undertaking.

The court charged the jury that it was an original, and not a collateral undertaking, and that the defendant was liable.

A verdict was accordingly rendered for the plaintiff. A motion was now made for a new trial, on the ground that the court misdirected the jury.

Mr. Justice HUGER delivered the opinion of the court.

It has been regarded as settled doctrine ever since the case of *Buckmyr* v. *Darnall*, (2 Lord Raymond, 1085; Robt. on Frauds, 218), that when no action will lie against the party undertaken for, it is an original promise. If A promise B that in consideration of his doing a particular act, C shall pay him such a sum, and if C do not pay him, he, A, will pay the same; this is said to be no collateral undertaking on the part of A unless C was privy to the contract, and recognized himself as a debtor also. (Fitzgibbon, 302; Robt. on Frauds, 223.) In the case before me, the defendant undertook for the representative of Dr. Bradley, against whom no action could lie for the articles furnished for the funeral of Mrs. Bradley. And there was no privity of contract between the plaintiff and the nephew of Dr. Bradley. But it has been urged, that the subsequent promise of the nephew had a retroactive operation, and rendered him liable; but if he were not liable before the promise was made, he could not be so afterwards. It was not in writing, and was *nudum pactum*. Had the defendant undertaken *for the state or legal representative of Mrs. Bradley*, who was legally bound to pay the expenses of her funeral, it would have been a different question; but she unfortunately undertook for one who was not responsible, and who was so far from being privy to the contract, or acknowledging himself a debtor, refused payment and denied the authority of the defendant to render him responsible.

I am of opinion, therefore, that the motion must be refused.

NOTT, JOHNSON, RICHARDSON and COLCOCK, JJ., concurred.

Mr. Justice GANTT dissented.

King, for the motion.

Hunt, contra.

WELCH *vs.* MARVIN (1877).

36 Mich. 59.

Error to Ionia Circuit.

Sessions & Strickland and *A. B. Morse*, for plaintiff in error.

Lemuel Clute, for defendant in error.

MARSTON, J. Marvin, who was plaintiff below, brought an action of assumpsit to recover the value of a certain meat furnished by him to be used in a boarding train upon the D., L. & L. M. R. R. It appears from the testimony that one Hiram Cook, who was engaged in keeping such boarding car, had obtained his supply of meat from the plaintiff, and in June, 1875, was owing him for meats furnished $117.78; that about the 14th of June he refused to trust Cook any longer or furnish him with any more meat, unless some different arrangements were made; that Welch, who had been supplying Cook with groceries, went to see Marvin, in company with Cook, to make some arrangement about this matter. Marvin testified that he (Welch) then said: "This pay is now assigned over to me from the railroad company, and I am going to become responsible for the meat, and I want meat to run this train, and what meat you let Cook have from now, I will pay you for." Marvin then told Welch that Cook had got meat there from the middle of April up to the first of June, that had not been paid for, and that he would not let any more meat go until he was paid for that; that Welch replied, "Well, you get an order on me from Cook and I will accept that order, and pay you as fast as the money comes into my hands to pay that." The next morning an order was drawn up for $117.78; this order was accepted by Welch, providing money enough came into his hands from the company to pay his own account first, the balance to be paid on this order. Different amounts were paid by Welch, in all amounting to two hundred and fifteen dollars; but it does not appear that any other orders were given. It also appears from plaintiff's testimony that he, in September, received an order from Cook on the railroad company for one hundred dollars, which he endeavored to collect. After the arrangement made with Welch, plaintiff continued to charge the meats thereafter delivered to Cook, in the same manner he had previously done, no change having been made on his books in the manner of keeping the account. There was considerable conflicting evidence, as is usually expected in such cases, as to what the agreement really was, as to the reason of continuing to charge the meat to Cook upon plaintiff's books, and the efforts made to collect the amount.

The courts, in charging the jury, very properly left it to them to find what the agreement between the parties actually was, and the conclusion to be drawn from such finding. Defendant's counsel requested the following instructions to be given: "If the jury find that Marvin sold meat to Cook and charged the same to Cook, and that Welch became responsible for it, in order to take the promise out of the Statute of Frauds, and make Welch legally liable, they must also find that Marvin thereupon absolutely discharged Cook from liability, and looked only to Welch for pay." Other instructions having a similar tendency were requested to be given. These requests were refused, the jury being merely instructed that the manner of keeping the account, and efforts to collect from Cook, were facts capable of explanation, and might be considered by the jury. We are of opinion that defendant was entitled to have the jury instructed as requested. Under no theory of this case could Cook and Welch both be responsible to plaintiff, severally, at his option. If Cook was liable for the meats furnished after the arrangement with Welch was made, then clearly Welch's liability could not be an original one. It is equally clear that if Welch's promise was an original promise, and the debt his debt, then Cook could not be held liable thereon. The parties might have made an agreement under which they would have been jointly liable, which is not claimed in this case. But they could not, under the circumstances, be severally liable, at plaintiff's option. We know of no better test than this, in a case like the present. *Bresler* v. *Pendell,* 12 Mich. 224; *Gibbs* v. *Blanchard,* 15 Mich. 292; *Corkins* v. *Collins,* 16 Mich. 480.

The judgment must be reversed, with costs, and a new trial ordered.

The other justices concurred.

KIMBALL *vs.* NEWELL (1845).

7 Hill (N. Y.) 116.

On error from the superior court of the city of New York, Newell brought an action of covenant against Kimball in the marine court of the city of New York, claiming to recover certain rent due on a lease to one Theodosia Knowlton, for whom the defendant had become surety. On the trial, the plaintiff gave in evidence the following instruments:

"This is to certify that I have hired and taken from Daniel Newell the house in Nassau street, etc., for one year, to commence on the first day of May next, at the yearly rent of four hundred and fifty dollars, payable quarterly. And I do hereby promise to make punctual payment of the rent, in manner aforesaid, and quit and surrender the premises, at the expiration of the term, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted. Given under my hand and seal the 3rd day of March, 1840.

MRS. T. KNOWLTON, [L. S.]"

"In consideration of the letting of the premises above described, and for the sum of one dollar, I hereby become surety for the punctual payment for the rent, and performance of the covenants, in the above written agreement mentioned, to be paid and performed by Mrs. Theodosia Knowlton, and if any default should be made therein, I do hereby promise and agree to pay unto the said Daniel Newell such sum or sums of money as will be sufficient to make up such deficiency, and fully satisfy the conditions of the said agreement, without requiring any notice of non-payment, or proof of demand being made. Given under my hand and seal the 3d day of March, 1840.

"M. T. C. KIMBALL, [L. S.]"

It appeared that Mrs. Knowlton occupied under the lease, and that a balance of rent, amounting to $31.94, remained due the plaintiff. It further appeared that Mrs. Knowlton was a married woman at the time the lease was executed; and the defendant contended that, inasmuch as her covenant was void by reason of coverture, his was also void. The marine court held otherwise, however, and rendered judgment in favor of the plaintiff, which was afterwards affirmed by the superior court on certiorari, and the defendant brought error.

R. H. Shannon, for the plaintiff in error.

Howard & Ouderdonk, for the defendant in error.

NELSON, Ch. J. The defendant having consented to become bound as surety for the rent of the premises leased to Mrs. Knowlton, it is but reasonable to presume that, if he was not well acquainted with her situation before, he then made some enquiries into her circumstances and condition, and thus became fully possessed of the facts which he now sets up as a ground of discharge.

But conceding that the defendant had no knowledge of the social condition of Mrs. Knowlton, and that he supposed she would be legally holden for the rent as it accrued, I am still of the opinion that he is liable on his contract. The doctrine for which his counsel contends is thus stated by Theobald: "The obligation of the surety being accessory to the obligation of some person who is the principal debtor, it is of its essence that there should be a valid obligation of a principal debtor. The nullity of the principal obligation necessarily induces the nullity of the accessory." (Theob. Prin. & Sur. 2.) This is undoubtedly correct as a general rule; but it has its exceptions, and the case before us is one of them.

Mr. Chitty says: "The rule that a party can not be liable upon a contract of guarantee, unless the principal has incurred a legal responsibility, is true, in some instances, in form or words, rather than in substance." (Chitty on Contr., 499.) He adds: "In the case of a guarantee to answer for the price of goods to be supplied to a married woman, or goods (not necessaries) to be sold to an infant, or other persons incompetent to contract, no doubt the party guaranteeing, though professedly contracting only in the character of surety, would be responsible." (Id.) He refers to the case of *Maggs* v. *Ames* (4 Bing. 470), which was an action against the defendant as surety for a married woman. There the

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question was whether the undertaking of the defendant was an original one, so as not to require it to be in writing. The court held that it was collateral, and therefore should have been in writing. But neither the counsel nor court supposed that the defendant would not have been bound, if the contract had been in writing. On the contrary, that was assumed. In the case of *White* v. *Cuyler* (6 T. R. 176), it was impliedly at least conceded by Lord Kenyon, that a guarantor or surety for a feme covert would be liable on his contract. (See also Chitty on Contr., 515; Pitman on Prin. and Surety, 13; *Buckmyr* v. *Darnall* (2 Ld. Raym. 1085); *Harris* v. *Hunchback* (1 Burr. 373); *Chapin* v. *Lapham* (20 Pick. 467).

The doctrine of the civil law is very clear and satisfactory on this subject. It is as follows: "Although the obligation of a surety be only an accessory to that of the principal debtor, yet he who has bound himself surety for a person who may get himself relieved from his obligation, such as a minor, or a prodigal who is interdicted, is not discharged from his suretyship by the restitution of the principal debtor: and the obligation subsists in his person; unless the restitution were grounded upon some fraud, or other vice which would have the effect to annul the right of the creditor." (Dom. B. 3 tit. § 1, art. 10, Strahan's ed.) Again: If the principal obligation was annulled only because of some personal exception which the principal debtor had, as if it was a minor, who, in consideration of his being under age, got himself relieved from an engagement by which he suffered some prejudice, and that there had been no fraud on the creditor's part; the restitution of the minor would have indeed this effect, that it would annul his obligation to the creditor, and his engagement to save harmless his surety, if he desired to be relieved from it. But the said restitution of the minor would not in the least invalidate the surety's obligation to the creditor. For it was only to make good the obligation of the minor, in case he should be relieved from it on account of his age, that the creditor took the additional security of a surety." (Id., B. 3, tit. 4, § 5, art. 2; and see 1 Ev. Poth. on Obl. 237.)

I am satisfied that the decision of the court below was right, and that the judgment should be affirmed.

BEARDSLEY, J. I think the defendant was estopped from denying the competency of Mrs. Knowlton to bind herself by the covenant she assumed to execute. The defendant by his covenant admits she was thus bound, and he shall not be allowed to gainsay it by alleging her incapacity to make a legal contract. Had she been induced to enter into this engagement by fraud or imposition, or upon a usurious consideration, the case might have been otherwise; but the defendant, although a surety, cannot be permitted, on the ground now set up, to deny the legal existence of a covenant which is explicitly conceded by his own deed. (Co. Litt. 352, a, note 306; 1 Stark. Ev. 302, Am. ed. of 1830; Greenl. Ev., §§ 22 to 26, and the notes.)

The judgment of the court below is right, and should be affirmed.

Judgment affirmed.

DEXTER *vs.* BLANCHARD (1865),

11 Allen 365.

CONTRACT brought upon an oral promise by the defendant to pay to the plaintiff a bill for the hire of horses and carriages, and for injury to a wagon.

At the trial in the superior court, before MORTON, J., the plaintiff offered to prove that the horses and carriages were hired and the injury done by the defendant's minor son, to whom the credit therefor was given; and that not long after the date of the last charge the defendant's son became sick, and while so sick the plaintiff several times demanded payment of him, and thereupon the defendant verbally promised to pay the plaintiff's bill if the plaintiff would not trouble his son any further: to which the plaintiff agreed. The son afterwards died. It was admitted that the bill was not for necessaries.

The judge ruled that upon these facts the action could not be maintained, and a verdict was returned accordingly for the defendant. The plaintiff alleged exceptions.

E. L. Sherman, for the plaintiff.

W. Brigham, for the defendant.

BIGELOW, C. J. The ruling of the court was in accordance with well established principles. The defendant's promise, although it may have been made on a good consideration as to the plaintiff, was nevertheless a promise to pay the debt of another, and no action can be maintained upon it. Gen. Sts., c. 105, § 1. The fallacy of the argument urged in behalf of the plaintiff lies in the assumption that there was in fact no debt due from the son of the defendant, because he was a minor at the time he undertook to enter into a contract with the plaintiff. A debt due from a minor is not void; it is voidable only; that is, it cannot be enforced by a suit at law against the contracting party, on plea and proof by him of infancy. But it is voidable only at the election of the infant, and until so avoided it is a valid debt. Nor can a third person avail himself of the minority of a debtor to obtain any right or security or title. Infancy is a personal privilege, of which no one can take advantage but the infant. *Kendall* v. *Lawrence*, 22 Pick. 540; *Nightingale* v. *Withington*, 15 Mass. 274; *McCarty* v. *Murray*, 3 Gray, 578.

The effect of the doctrine contended for by the counsel for the plaintiff would be that a verbal agreement to answer for the debt of another would be valid, if it could be shown that the original contracting party could have established a good defence to the debt in an action brought against him. We know of no principle or authority on which such a proposition can be maintained. It certainly would open a wide door for some of the mischiefs which the statute of frauds was designed to prevent.

The case for the plaintiff derives no support from the argument based on proof of an agreement by the plaintiff to forbear to sue the defendant's son, in consideration of the promise of the latter to pay the debt. It is perfectly well settled that it is not a sufficient ground to prevent the operation of the statute of frauds, that the plaintiff has relinquished an advantage or given up some lien or claim in consequence of the defendant's promise, if that advantage or relinquishment did not also directly enure to the benefit of the defendant. It is only when such relinquishment or surrender operates to transfer to the defendant the right, interest or advantage which the plaintiff gives up, or to create in the defendant some title or benefit derived from that which the other party surrenders, that the promise can be regarded as an original undertaking, and not within the statute. *Curtis* v. *Brown*, 5 Cush. 488, and cases cited.

Exceptions overruled.

LEE *vs.* YANDELL, ET AL. (1887),

69 Tex. 34.

This suit was brought by appellant against Yandell, appellee, and W. A. Gray and A. M. Waldrup, on a promissory note, joint and several upon its face, but which it was alleged in the answer that Gray and Waldrup signed as sureties. The answer alleged that Yandell was non compos mentis when the note was made and that there was no consideration therefor.

Charles I. Evans, for appellant.

W. H. Cowan, for appellees.

MALTBIE, J. The third charge is as follows:

"If you find from the evidence that the defendant, Yandell, at the time he signed the note sued on, was of unsound mind to such an extent as to be unable to comprehend the nature, meaning and effect of his act in signing such note, you will return a verdict for defendants."

This was also assigned as error; and, being the only instruction given in reference to Yandell's sanity, it should be considered in the light of all the facts proven on the trial in reference to that subject. While it must be regarded as an imperfect presentation of the law of the case, as a general proposition it can not be said to be incorrect; and the plaintiff not having called the attention of the court to other phases of the question by asking appropriate instructions, ordinarily there would not be error in the omission. (*Farquhar* v. *Dallas*, 20 Texas, 200; *Gallagher* v. *Bowie*, 66 Texas, 265.) In this case, however, two other persons signed said note as sureties, and, under the charge, the jury found in favor of said sureties as well as the principal, Yandell.

As a general proposition, whenever a principal on a note is discharged, his sureties will be also; but to this rule there are certain well established exceptions. For instance, the note of a married woman is generally held to be void; but if persons, not themselves under disability, sign the note of a married woman, without the payee having been guilty of fraud or deceit in procuring the signature of such married woman, the sureties would be liable though the principal be discharged. (2 Daniel on Neg. Inst., par. 1306a; *Davis* v. *Staaps*, 43 Ind. 103; *Allen* v. *Berryhill*, 27 Iowa 531; *Hicks* v. *Randolph*, 3 Baxter 352.)

The same principle has been extended to sureties on notes executed by infants; and it is believed that no valid reason can be given why sureties of a person of unsound mind should not be held liable under like circumstances, though the principal be discharged, especially so, when the payee of the note is ignorant of the fact that the principal is a lunatic; as in such case a recovery might be had even against the lunatic, if the payee acted in good faith. (Pomeroy's Equity, volume 2, page 946.) The contract of a surety is, that if the principal does not pay, he will, and sound policy as well as the plainest principles of justice demand, that when there is a valid consideration, and the payee has done nothing to deceive or mislead either principal or surety, and the principal is held to be not liable, on account of some disability existing at the time of the making of the contract, whether such disability be coverture, infancy or unsoundness of mind, the surety should be held to the terms of his contract. The reason given in some of the cases why the surety of a married woman is held, is that the payee and the surety knew at the time that the contract was made that the married woman might refuse to pay, or that the contract was made in reference thereto, the surety binding himself to pay in case she should avail herself of her legal rights. In case of a lunatic it might be presumed that if the payee knew of the disability, the sureties being his close friends, would also know of it, and that the contract was made in reference to that state of facts. There was no evidence that Lee had in any manner deceived, overreached or defrauded Yandell in procuring him to sign the note. Hence we are of opinion that the charge of the court should have been limited to Yandell, and the question submitted as to the liabilities of the sureties on the principles herein enunciated.

Reversed and remanded.

Opinion adopted November 1, 1887.[1]

RUSSELL *vs.* ANNABLE (1871).

109 Mass. 72.

CONTRACT, brought August 3, 1870, against one of the sureties in the following bond given under the Gen. Sts. c. 123, §104, to dissolve an attachment:

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[1] The opinion on other questions is omitted.

"Know all men by these presents, that Erastus Dennett and Chas. R. Pottle, of Boston in the county of Suffolk, as principal, and George M. Stevens, of Cambridge, and John F. Annable, of Somerville, in the county of Middlesex, as surety, are holden and stand firmly bound and obliged unto Arthur W. Russell, of Cambridge in said Middlesex, in the full and just sum of two hundred dollars, to be paid unto the said Russell, his executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, dated the twenty-second day of July in the year of our Lord one thousand eight hundred and sixty-nine. The condition of this obligation is such, that, whereas the said Russell has caused the goods and estate of said Dennett & Pottle, to the value of two hundred dollars, to be attached on mense process in a civil action, by virtue of a writ bearing date the 21st day of July, A. D. 1869, and returnable to the superior court for civil business to be holden at said Boston within and for the county of Suffolk on the first Tuesday of October next, in which said writ the said Arthur W. Russell is plaintiff, and the said Erastus Dennett and Charles R. Pottle the defendants, and whereas the said defendants wish to dissolve the said attachment according to the provisions of the General Statutes in such cases made and provided; Now, therefore, if the above bounden Russell shall pay to the plaintiff in said action the amount, if any, which he shall recover therein, within thirty days after the final judgment in said action, then the above written obligation shall be null and void, otherwise to remain in full force and virtue.

"DENNETT & POTTLE, [seal]
"GEORGE M. STEVENS, [seal]
"JOHN F. ANNABLE, [seal]"

"Signed, sealed and delivered
in presence of
"EDWARD RAYMOND."

The declaration alleged that the plaintiff at said October term 1869 of the superior court duly entered the action named in the bond, and such proceedings were had therein that he obtained judgment against said Dennett & Pottle at April term 1870 for $110 damages and $21.49 costs, and no part of said judgment had been paid, though the defendant had often been requested to pay the same, and the defendant owed him the amount of said judgment and the costs subsequently accrued thereon. The answer denied each and every allegation of the plaintiff.

Trial in the superior court before Scudder, J., who by consent of the parties reported the following case before verdict: "This was an action on a bond, of which a copy is annexed. It appeared that Erastus Dennett and Charles R. Pottle were copartners, under the firm name of Dennett & Pottle, and that the execution of the bond, as to the principal, was by one of them. It was contended by the defendant that the bond was void upon its face; also that there was no legal execution of it by the principals, and therefore it was void as to the defendant. If these objections are valid, then judgment is to be for the defendant; if invalid, then judgment for the plaintiff, $138.83, with interest from June 24, 1870, being the date of original judgment and costs. The officer's return on the original writ and judgment may be referred to. The execution of the bond by the defendant was admitted." The return of the officer thus referred to, certified that the property attached by him for dissolution of which attachment the bond was given, was property of Dennett & Pottle, and that he took the bond "of said Dennett & Pottle, with George M. Stevens and John F. Annable as sureties."

J. S. Abbott, for the plaintiff.

C. C. Read, for the defendant.

AMES, J. It is well settled that one partner cannot bind his associates by affixing his signature, in the name and style of the firm, to an instrument under seal. To make such a transaction binding it must appear that there was either a previous authority, or a subsequent ratification on the part of the other partners, adopting the signature as binding upon them. *Cady* v. *Shepard,* 11 Pick. 400; *Van Deusen* v. *Blum,* 18 Pick. 229; *Swan* v. *Stedman,* 4 Met. 548; *Dillon* v. *Brown,* 11 Gray, 179. The report in this case presents no evidence of any previous authority or subsequent ratification, and it follows that the bond is not so executed as to bind the members of the firm.

The bond purports to be the joint and several contract of certain persons named therein as principals, and the defendant and George M. Stevens as sureties. The defendant's undertaking is only that the principal obligors shall fulfill the obligation which by the terms of the bond they have assumed. But if the bond was not binding upon both Dennett and Pottle, (as it was not, for want of due and proper execution of the instrument on their part,) they assumed no obligation, and it was not binding upon the sureties. It was essential to the bond that the principals should be parties to it: it is recited that they are so, and the instrument is incomplete and void without their signature. The remedy of sureties against their principals might be greatly embarrassed, if such an instrument as this should be held binding. There is nothing to estop any member of the firm, who did not sign it, from denying that he was a party to it, and it was no part of the defendant's contract that he should be surety for one member of the firm, and not for both. The instrument is incomplete without the signature of each partner, or proof that the signature affixed had the assent and sanction of each of them. The sureties on a bond are not holden, if the instrument is not executed by the person whose name is stated as the principal therein. It should be executed by all the intended parties. *Bean* v. *Parker,* 17 Mass. 591; *Wood* v. *Washburn*, 2 Pick. 24.

The instrument, being found incapable of taking effect as a specialty, cannot operate as a simple contract. Cases have indeed arisen, in which a bond, duly executed, expressing a contract which the parties had a right to make, has been held to be valid at common law, although not made with the formalities, or executed in the mode, provided by a statute under which it purports to have been given. See *Sweetser* v. *Hay,* 2 Gray, 49, and cases there there cited. But we find no case in which it has been held that a written instrument, purporting to be a specialty, and plainly intended by the parties to have all the incidents and characteristics of a bond in the strict and technical sense of that word, has ever been transmuted by the court into a simple contract, for the reason that it has not been properly executed to take effect as a contract under seal.

It is therefore held by a majority of the court, that there should be judgment for the defendant.

NOTE.—The dissenting opinion of WELLS, J., is omitted.

WEARE *vs.* SAWYER (1862).

44 N. H. 198.

ASSUMPSIT upon a promissory note of which the following is a copy: (*Weare* v. *School District*, 44 N. H. 189.)

"$725.

WEARE, NOV 10, 1855.

For value received, we, John Jepson, prudential committee, and Paige E. Gove, clerk of School District No. 16 in Weare, duly authorized to hire money in the name of said district, for the purpose of building a schoolhouse, and John W. Chase, Moses Sawyer, Allen Sawyer, Daniel Sawyer, Peter C. Gove, L. W. Gove, Lewis Greenleaf, J. P. Adams, Amos Chase, M. F. Currier, D. G. Chase, A. H. Emerson, and D. S. Stanley, as sureties, jointly and severally promise to pay the town of Weare, or order, seven hundred and twenty-five dollars, on demand, with interest annually, it being a part of the ministerial fund belonging to said town of Weare, now in the hands of Hiram Simonds, to take care of said fund in behalf of the town.

JOHN JEPSON, Prudential Committee.
PAIGE E. GOVE, Clerk.
JOHN W. CHASE (and others), sureties."

Morrison, Stanley & Clark, for defendant.

Fowler & Chandler, on same side.

I. W. Smith, for plaintiffs. *Perley,* on same side.

BELLOWS, J. It has already been decided, in *Weare* v. *School District,* and *Weare* v. *Gove,* reported in this volume, that the vote to borrow money was not passed at a meeting duly called for that purpose; and, therefore, as the agents of the district had no authority to put its name to the note, they are themselves bound; and the remaining ground of defense proposed to be set up is, in substance, that at the time of the making of the note it was agreed that the defendants' undertaking should extend no farther than to insure the performance of such contract as had been legally entered into by the school district, whereas the defendants' contract to pay the money is on its face absolute.

The general rule would, undoubtedly, exclude such parol evidence; and we are not aware of any exception by which it could be admitted.

It is true that parol evidence may be received to prove that one of the makers is but a surety; although nothing of the kind appears upon the face of the instrument. *Bank* v. *Kent,* 4 N. H. 221. This, however, is not for the purpose of varying the obligation as originally entered into, but is admitted in connection with proof of indulgence to the principal, to show a subsequent discharge of such surety, by substituting a new contract, to which he was no party.

The case of *Hoyt* v. *French,* 24 N. H. 198, is in point. There it was proposed to show by parol that when the surety signed the note it was agreed that the first money paid by the principal should be applied thereon, and that money had been so paid, but not applied; and it was held that the evidence was not admissible, as the effect would be to vary the terms of the note. Of the same character is *Lang* v. *Johnson,* 24 N. H. 302.

It is said, also, that the liability of the surety is coextensive only with that of the principal, and that the school district must be regarded as the principal here. As a general proposition it may be true that, in the contract of guaranty, there must be a principal who is also liable. It would be true in all cases where the guarantor stipulated to guaranty the performance of the principal's engagement.

But in that large class of cases where the contract is to pay a specific sum of money, there, we apprehend, the guarantor or surety is, in the absence of fraud, bound by the terms of his contract, although his principal, by reason of coverture, infancy, or want of authority in the person assuming to act for him, is not bound.

So it is laid down (Chit. on Cont., 9 Am. Ed. 441) in respect to infants, married women, and other persons incompetent to contract; and we see no reason why the same doctrine does not apply to the case of a want of authority. In fact it appears to have been so applied in the case of a surety for a partnership, where the name of the firm was affixed to the note without authority. *Stewart* v. *Boehm*, 2 Watts, 356; 3. U. S. Dig. 496, sec. 154.

The same principle is recognized in *Conn* v. *Coburn,* 7 N. H. 368–373, where a surety for an infant upon a promissory note, given for necessaries, having paid the note, was permitted to recover the amount of the infant; Parker, J., holding, that as the surety was bound, as the debtor, to pay the note, he had a right to do so, and call upon the infant. Such, also, is the doctrine of *St. Albans Bank* v. *Dillon,* 30 Vt. 122, where the principal was a married woman. Pars. on Cont. 194.

Beside, in the case before us, the agents, who used the name of the district without authority, are themselves bound as principals, and it is not competent to show as a defense that the sureties supposed the district to be the principal. Had they been misled by fraudulent representations of the town, a remedy might be found for them; but as the case stands, they, acting upon their own understanding of the law and the facts, have promised to pay the sum loaned, and we think they are bound by it.

It is suggested, also, that, in case of a mistake in this respect, it may be shown and corrected, but we think it can not be done in this form, but only by bill in equity.

In accordance with the agreement of the parties, there must therefore be

Judgment for the plaintiffs.

HAZARD ET AL. *vs.* GRISWOLD (1884),
21 Fed. 178.

Action of Debt on Bond.

Edwin Metcalf, for plaintiffs.

Sam'l R. Honey and *Arnold Greene,* for defendant.

Before GRAY and COLT, J. J.

GRAY, Justice. This is an action of debt, commenced in the Supreme Court of the State of Rhode Island, on March 3, 1883, by four citizens of Rhode Island against a citizen of New York, on a bond dated August 24, 1868, and executed by Thomas C. Durant as principal, and the defendant and S. Dexter Bradford as sureties, binding them jointly and severally to the plaintiffs in the sum of $53,735, the condition of which is that Durant "shall on his part abide and perform the orders and decrees of the Supreme Court of the State of Rhode Island in the suit in equity of Isaac P. Hazard and others against Thomas C. Durant and others, now pending in said court within and for the county of Newport."

The breach assigned in the declaration is that Durant has not performed a decree by which that court, on December 2, 1882, ordered him to pay into its registry the sum of $16,071,659.97. (That part of the opinion preceding consideration of fifth plea is omitted.)

The fifth plea alleges that Durant, at the time and place of the making of the supposed writing obligatory, "was unlawfully imprisoned by the said plaintiffs and others in collusion with them, and then and there detained in prison, until, by the force and duress of imprisonment of him, the said Thomas C. Durant, he, with the said defendant as surety, made the said writing, signed and sealed and delivered the same to the said plaintiffs as their deed." To this plea the plaintiffs have demurred, because it does not allege that the writing was executed by the defendant under force and duress of imprisonment of himself, nor that he did not voluntarily execute it as surety with knowledge that it was executed by Durant as principal under force and duress of imprisonment, as alleged in the plea. This plea does not set forth facts enough to make out a defense. Duress at common law, where no statute is violated, is a personal defense, which can only be set up by the person subjected to the duress; and duress to the principal will not avoid the obligation of a surety; at least, unless the surety, at the time of executing the obligation, is ignorant of the circumstances which render it voidable by the principal. *Thompson* v. *Lockwood*, 15 Johns. 256; *Fisher* v. *Shattuck*, 17 Pick. 252; *Robinson* v. *Gould*, 11 Cush. 55; *Bowman* v. *Hiller*, 130 Mass. 153; *Harris* v. *Carmody*, 131 Mass. 51; *Griffith* v. *Sitgreaves*, 90 Pa. St. 161. The case of *Hawes* v. *Marchant*, 1 Curtis 136, in this court, was not a case of duress at common law, but of oppression by the illegal exercise of official power in excess of statute authority, and was decided upon that ground.[1]

Demurrers sustained.

EISING *vs.* ANDREWS (1895),

66 Conn. 58; 50 Am. St. R., 75; 33 Atl. 585.

Action on a bond given by the defendant's testator as surety, brought to the Superior Court in Fairfield county and tried to the court, THAYER, J.; facts found and judgment rendered from the plaintiff, and appeal by the defendant for alleged errors of the court. No error.

The case is sufficiently stated in the opinion.

Howard B. Scott, for the appellant (defendant).

Lyman D. Brewster and *John H. Perry*, for the appellee (plaintiff).

ANDREWS, C. J. The plaintiff is the only living partner of the late firm of E. Eising & Co. The defendant is the sole surviving executor of the will of Thomas F. Fay, late of Danbury, deceased. In his lifetime, Fay had become obligated in a bond as surety for one Thomas F. Rowan, as principal, for which he bound himself, his heirs, executors and administrators, jointly and severally with the said Rowan, in the penal sum of two thousand dollars to the said E. Eising & Co., conditioned that the said Rowan, who had been employed by the said firm as salesman and collector, "shall well and faithfully discharge his duties as such collector and agent, and shall also account for all moneys, property and other things which may come into his possession or control by reason of his appointment and employment as such agent and collector." Fay died on the 25th day of June, 1892. On the fifth day of July next thereafter, the Court of Probate for the District of Danbury limited and allowed six months from said date for the presentation of claims against his estate. After Fay's death, and between June 25th, 1892, and August 26th, 1893, Rowan received as such collector and agent from the customers of E. Eising & Co. more than two thousand dollars of money which belonged to the plaintiff, but which he appropriated to his own use—of which amount the sum of $739.41 was misappropriated by Rowan after May 26th, 1893. This defalcation of Rowan was by him fraudulently concealed from the plaintiff, and was not discovered by the plaintiff until the first day of September, 1893. He then made demand of Rowan that he should account for and pay over to the plaintiff the said amount which he had misappropriated, but Rowan has at all times neglected and refused so to do. He was then and at all times since continues to be wholly insolvent.

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[1] The remainder of the opinion is omitted.

The plaintiff notified the defendant of such defalcation on the 26th day of September, 1893, and presented to him, as such executor, the claim of said partnership on said bond; and on the 18th day of November, 1893, made demand on him for the amount of the said bond, but the defendant refused to pay it. This suit was brought on the 21st day of November, 1893.

The defendant claimed as matter of law, that upon these facts the plaintiff was barred by the statute of limitations from recovering in this action for any sums of money misappropriated by Rowan prior to May 26th, 1893. And that the fraudulent concealment by Rowan of his misappropriation did not prevent the statute of limitations from running in favor of the defendant, nor postpone the time of the arising of the cause of action upon the bond until the plaintiff discovered the misappropriation. The court did not so hold, but rendered judgment for the plaintiff for the amount of the bond with interest from the date of the demand. The defendant appealed to this court.

The bond on which this suit is brought contains two conditions: first, that Rowan should faithfully discharge his duty as agent and collector for the said co-partnership; and second, that he should account for all moneys, property, or other thing that should come into his hands, possession, or control, by reason of his employment as such agent and collector. A breach of each of these conditions is alleged in the complaint, and the facts found by the court show that each had been broken by Rowan.

Section 581 of the General Statutes—being a statute concerning the estates of deceased persons—provides that "when a right of action shall accrue after the death of the deceased, it shall be exhibited within four months after such right of action shall accrue"; and that unless exhibited within such time the creditor shall be forever debarred of all right to recover the claim.

The breach of the second condition named in the bond took place, and the right of action thereon accrued, not earlier than the first of September, 1893, and within four months next before the claim was exhibited to the defendant. The Superior Court might well have rendered its judgment entirely on the breach of that condition in the bond. *McKim* v. *Glover,* 161 Mass. 418. And there is nothing in the case to show that it did not. Counsel for the defendant does not dwell on this part of the case.

Under the statute above recited the defendant admits that the plaintiff is entitled to recover the sum of $739.41, that being the amount of money misappropriated by Rowan within the four months next before the claim was exhibited to him. And he insists that because of that statute the plaintiff cannot recover for any moneys wrongfully appropriated by Rowan prior to the said four months. If that statute stood alone it is more than likely that this action would never have been contested. It is another statute which causes the dispute. Section 1389 enacts that: "If any person, liable to an action by another, shall fraudulently conceal from him the existence of the cause of such action, said cause of action shall be deemed to accrue against said person so liable therefor, at the time when the person entitled to sue thereon shall first discover its existence." Applied to a cause of action, the term to accrue means to arrive; to commence; to come into existence; to become a present enforcible demand. And the true meaning of this statute is, that in cases to which it is applicable, the cause of action does not come into existence until it is discovered by the person entitled to sue thereon. The effect of this statute upon the present case is that no cause of action came into existence by reason of Rowan's defalcation until it was discovered by the plaintiff.

It is admitted by the defendant that this is the effect of the statute, if limited to Rowan himself. But the defendant says that the fraudulent concealment by Rowan does not prevent the accruing of a cause of action against him, the defendant. He says that fraudulent concealment of a cause of action prevents the running of the statute of limitations only in favor of the very party who commits the fraudulent concealment. He cites Wood on Limitations (2d Ed.), page 139, and the cases there referred to, as authority. Stated in somewhat different language the claim of the defendant is, that although the accruing of a cause of action was by reason of the last quoted statute suspended, as against Rowan, until the defalcation was discovered, yet the accruing of a cause of action was not suspended against this defendant; that as against him, this defendant, the cause of action arose when Rowan committed the defalcation; and as it appears by the case that all of the defalcation, except the sum of $739.41, was committed more than four months before the claim was exhibited to him, he cannot be made liable for that part.

It seems to us that there is a fallacy—or rather it is a fatal error—in this argument. It conflicts with the most essential feature of the law relating to surety and principal. The plaintiff seeks to recover damages on account of the defalcation of Rowan. The argument of the defendant assumes that a cause of action for such defalcation could exist against him before any cause of action therefor against Rowan had accrued. But the law relating to principal and surety forbids this. The rule is that a cause of action cannot exist against a surety, as such, unless a cause of action exists against his principal. Ordinarily the liability of such a surety is measured precisely by the liability of the principal. Brandt on Suretyship, § 121; *Seaver* v. *Young*, 16 Vt. 658; *Boone County* v. *Jones*, 54 Iowa 709; *Patterson's Appeal*, 48 Pa. St. 345; *McCabe* v. *Raney*, 32 Ind. 309. So long as no cause of action existed against Rowan, the principal, no cause of action existed against the defendant or his surety. And the statute of limitations does not begin to run in favor of any person, until there is a cause of action. The obligation of a surety is an obligation accessory to that of a principal debtor, and it is of the essence of this obligation that there should be a valid obligation of some principal. Thus, where one agrees to become responsible for another the former incurs no obligation as surety, if no valid claim ever arises against the principal. Chitty on Contracts (11th Ed.), 788. If the principal is not holden, neither is the surety; for there can be no accessory if there is no principal. De Colyar on Principal and Surety, Amer. Ed. 39; Addison on Contracts, § 1111. The existence of a principal debtor is a condition precedent to the operation of the contract of a surety. *Hazard* v. *Irwin*, 18 Pick. 95; *Swift* v. *Beers*, 3 Denio 70; *Mountstephen* v. *Lakeman*, L. R. 7 Q. B., 202; *Mallet* v. *Bateman*, L. R. 1 C. P., 163. This is only in accordance with the general law of contracts, which prevents a contract from becoming operative unless and until all conditions precedent are fulfilled. Brandt on Suretyship, § 214; *Farmers and Mechanics' Bank* v. *Kingsley*, 2 Doug. (Mich.) 379. So too, whatever discharges the principal debtor discharges the surety. The liability of a surety on a claim which is good as against the principal, ceases as soon as the claim is extinguished against the principal. The nature of the undertaking of a surety is such that there can be no obligation on his part, unless there is an obligation on the part of the principal. "It is correctly laid down, in Chitty on Contracts, that the contract of a surety is a collateral engagement for another, as distinguished from an original and direct agreement for the party's own act; and, as stated in Theobold on Principal and Surety, * * * it is a corollary from the very definition of the contract of suretyship, that the obligation of the surety, being accessory to the obligation of the principal debtor or obligor, it is of its essence that there should be a valid obligation of such a principal, and that the nullity of the principal obligation necessarily induces the nullity of the accessory. Without a principal, there can be no accessory. Nor can the obligation of the surety, as such, exceed that of the principal. * * * It would be most unjust and incongruous to hold the surety liable, where the principal is not bound." STORRS, J., in *Ferry* v. *Burchard*, 21 Conn. 603. The same general doctrine is held in many other cases in this State. *Willey* v. *Paulk*, 6 Conn. 74; *DeForest* v. *Strong*, 8 id. 522; *Bull* v. *Allen*, 19 id. 101, 106; *Glazier* v. *Douglass*, 32 id. 393; *Candee* v. *Skinner*, 40 id. 464.

It follows, then, that the fraudulent concealment by Rowan, the principal, as it prevented the statute of limitations from running in his favor, also stopped it from running in favor of the defendant, his surety. *Bradford* v. *McCormick,* 71 Iowa 129; *Boone County* v. *Jones,* 54 id. 669; *Charles* v. *Hoskins,* 14 id. 471.

There is no error.

In this opinion the other judges concurred.

VILLARS *vs.* PALMER, Adm'r, *et al* (1873).

67 Ill. 204.

This was a bill in chancery, by William Villars, against Levin T. Palmer, administrator of the estate of Guy Merrill, deceased, and John G. Leverich, to enjoin proceedings at law by Palmer as administrator of the estate of Merrill, for the use of Leverich, upon a promissory note, given by one George W. Taylor as principal, and signed by the complainant as surety, and payable to said Guy Merrill as master in chancery. The bill showed that the estate of Taylor was solvent, and that the debt could have been made if the claim had been presented before it was barred by the two years limitation. The court below dismissed the bill. and the complainant appealed.

Messrs. *Townsend & Young,* and Mr. *E. S. Terry,* for the appellant.

Mr. *O. L. Davis* and Mr. *J. B. Mann,* for the appellees.

SHELDON, J. The claim on the part of the surety in this case is, that, as by the neglect of the creditor to present his claim against the estate of Taylor, the principal, all remedy in respect to the debt has been lost against the estate of the principal, that should operate to discharge the surety.

The complaint is of mere delay, not of any affirmative act on the part of the creditor, whereby the surety has been affected. But it is the well established principle, that mere delay on the part of the creditor to proceed against the principal does not discharge the responsibility of the surety.

In cases of this sort, there is not any duty of active diligence incumbent on the creditor. All that the surety has the right to require of the creditor, in the absence of any statute provision, is, that no affirmative act shall be done that will operate to his prejudice. It his business to see that the principal pays.

The law furnished the surety here with ample remedies for his protection. He might have paid the debt according to his undertaking, and have sued the principal himself; or he might have gone into a court of equity after the debt became due, and obtained a decree that the principal should pay it; or he might, under the statute, have given to the creditor written notice to put the note in suit, and thus have compelled him to sue the principal.

If he has seen fit to lie by, and the neglect to proceed against the principal in his life time, or against his estate after his decease, has been the means of depriving the surety of his indemnity, he must abide by the loss, and cannot throw it upon the creditor.

Without more, we need but to refer to the cases of *The People* v. *White et al.* 11 Ill. 342, and *Taylor* v. *Beck,* 13 id. 376, where the subject is fully considered and the authorities cited. In the former case, the very point made by the surety here is decided adversely to him.

Under the statute of March 4, 1869, Sess. Laws 1869, p. 305, where the principal maker of a joint note has departed this life, it is made the duty of the holder of the note to present the same against the estate of the decedent for allowance, to the proper court, within two years after the granting of the letters of administration. But that statute is too late to affect the present case.

The decree of the court below dismissing the bill is affirmed.

Decree affirmed.

AUCHAMPAUGH, Adm'r, *vs.* SCHMIDT (1886).

70 Iowa 642; 27 N. W. 805.

Action upon a promissory note purporting to be executed as a joint note by one Charles Leipold and the defendant. The note was executed in Illinois, where Leipold lived, and still lives. It became due May 23, 1871, and this action was commenced January 28, 1885. The defendant pleaded that he signed the note merely as surety; that under the law of Illinois the note became barred as against Leipold by the statute of limitations; and that, being barred as against Leipold, the principal, it was barred as against his surety, the defendant. There was a trial to a jury, and a peremptory instruction given to find for the plaintiff. Verdict and judgment were rendered accordingly, and the defendant appeals.

Woodward & Cook, for appellant.

E. E. Hasner and *Daniel Smyser,* for appellee.

ADAMS, J. The note was executed to one Schneider, the plaintiff's intestate. The fact that the note was signed by the defendant as surety was proven only by the defendant's wife. An objection was raised to her testimony on the ground that she was an incompetent witness to prove such fact as against an administrator. The court overruled the objection, and the evidence was admitted, and no question is now raised as to the correctness of that ruling. If we should be of the opinion that she was incompetent, and that there was no proper evidence that the defendant's relation to the note was that of surety, we could not affirm upon that ground, because we do not know that the defendant might not have introduced other evidence upon the point if his wife's testimony had been excluded.

We come, then, to the question raised by the answer and the admitted evidence of suretyship, and that is as to whether a claim which is barred by the statute of limitations, as against the principal debtor, is *by reason thereof* barred also as against a surety. In answer to this question, we have to say that we think that it is. No authority has been cited upon either side which is directly in point. Ordinarily, we may presume that, where the statute has fully run as against the principal, it would happen that it had fully run as against the surety. But the case before us has this peculiarity: The defendant, when the note was executed, resided in Illinois. Before the note was barred by the statute of that state he removed to Iowa, and before the statute of this state had fully run the action was commenced. If, then, the defendant were a principal debtor, the note would not be barred as against him, however it might be as against Leipold. He must therefore rely solely upon the fact that he is surety upon the note, and upon the bar as against Leipold. Such being the case, it is perhaps not surprising that no authority should be cited that is precisely in point. It becomes our duty, therefore, to attempt to determine the case on principle. It would not be denied that a surety upon a note may set up any meritorious defense which the principal, if sued, might set up in his own behalf. Now, when the statute of limitations has run as against the principal, the law excuses him from setting up any meritorious defense which he may have, and allows him to rely upon the technical defense of the statute alone. The theory is that he was not under obligations to preserve any longer the evidence of his meritorious defense if he had any, and so the court will not inquire whether he had such defense or not. The statute has been very properly denominated the statute of repose. As the surety is allowed to set up any meritorious defense which the principal might have set up, we are not able to see why he should be required to preserve the evidence of such defense after the principal was not bound to do so. Again, when a surety pays a debt, it is his right to look to the principal for reimbursement. But a surety paying a debt, after it had become barred as against the principal, would be remediless. Now, we do not think that a creditor, by his own dilatoriness, should be allowed to put the surety in such position. It is not a full answer to say that a surety might have protected himself. It may be conceded that he might. But, practically, sureties often overlook their obligations if their attention is not called to them, and we do not think that the just protection of the rights of the creditor requires that we should hold so strict a rule against them as that for which the plaintiff contends.

It is said, however, that the defendant, if he is allowed to plead the bar of the statute at all as against the principal, should have averred and shown that no judgment in fact had been rendered against the principal. But we think that we would be justified in assuming, from the plea made, that judgment had not been rendered until it was averred and shown by the plaintiff to the contrary.

Reversed.

GUILD *vs.* BUTLER (1877).

122 Mass. 498.

Contract upon a promissory note made by the defendant payable to Robert W. Dresser & Co. or order, and by them indorsed to the plaintiff.

At the trial in the Superior Court, before Pitman, J., it appeared that the note was made by the defendant for the accommodation of Dresser & Co., who at the same time gave him an agreement in writing that they would themselves pay the note at maturity; that the plaintiff did not know this when he took the note, but, after learning it, and after the commencement of this action, united with other creditors of Dresser & Co. in a petition in bankruptcy against Herman D. Bradt, the surviving partner of that firm, (Dresser, the other partner, having died,) and afterwards voted for and signed a resolution of composition under the provisions of the act of Congress of June 22, 1874, § 17, by which the plaintiff with the other creditors of Dresser & Co. agreed to take, in full settlement, twenty per cent of their claims, to be paid in three equal installments, in ten days. three months and six months from the acceptance of that resolution, which was approved by the court in bankruptcy and recorded.

The judge instructed the jury that, if the note sued on was an accommodation note, and the defendant, as between him and Dresser & Co., was but a surety, and the plaintiff knew that it was an accommodation note when he entered into the resolution of composition, the fact of his entering into that resolution would constitute a defence to this action. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

P. H. Hutchinson, for the plaintiff.

R. Stone, Jr., for the defendant.

Gray, *C. J.* By the existing acts of Congress upon the subject of bankruptcy, a bankrupt's estate may be settled, and the bankrupt discharged, in either of three ways:

First. The estate may be administered in the ordinary manner by assignees appointed for the purpose, and a certificate of discharge be granted by the court, with the assent, in some cases, of a certain proportion of the creditors who have proved their claims. Any person liable as surety for the bankrupt may, upon paying the debt, even after the commencement of proceedings in bankruptcy, prove the debt, or stand in the place of the creditor if he has proved it; or, the debt not having been paid by him nor proved by the creditor, may prove it in the name of the creditor or otherwise. U. S. Rev. Sts. § 5070. *Mace* v. *Wells,* 7 How. 272; *Hunt* v. *Taylor,* 108 Mass. 508. But the surety's liability to the creditor is not affected by any certificate of discharge granted to the principal. U. S. Rev. Sts. § 5118. *Flagg* v. *Tyler,* 6 Mass. 33.

Second. The estate may be wound up and settled by trustees nominated by the creditors, upon a resolution passed at a meeting for the purpose by three-fourths in value of the creditors whose claims have been proved, and confirmed by the court, and upon the signing and filing, by such proportion of the creditors, of a consent in writing that the estate shall be so settled; in which case such consent and the proceedings under it bind all creditors whose debts are provable, even if they have not signed the consent nor proved their debts; the trustees have the rights and powers of assignees; the winding up and settlement are deemed proceedings in bankruptcy; the court may summon and examine on oath the bankrupt and other persons, and compel the production of books and papers; and the bankrupt may obtain a certificate of discharge in the usual manner. U. S. Rev. Sts. § 5103.

Third. The creditors, at a meeting ordered by the court, either before or after an adjudication of bankruptcy, may resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due them from him. Such resolution, to be operative, must be passed by a majority in number of the creditors whose debts exceed fifty dollars in value, and by a majority in value of all the creditors, and must be confirmed by the signatures of the debtor, and of two-thirds in number and one-half in value of all his creditors The debtor is required to attend at the meeting to answer inquiries, and to produce a statement of his assets and debts and of the names and addresses of his creditors. The resolution, with this statement, is to be presented to the court; and if the court, after notice and hearing, is satisfied that the resolution has been duly passed and is for the best interest of all concerned, the resolution is to be recorded and the statement filed, and the provisions of the composition shall be binding on all the creditors whose debts, names and addresses are shown on the statement, and may be enforced by the court on motion and reasonable notice, and regulated by rule of court, or may be set aside by the court for any sufficient cause, and proceedings in bankruptcy had according to law. U. S. St. June 22, 1874, § 17. This section, providing for a composition under the supervision of the court, is taken from and substantially follows § 126 of the English bankrupt act of 1869, St. 32 and 33 Vict. *c.* 71. See *Ex parte Jewett,* 2 Lowell, 393; *Re Whipple,* 2 Lowell, 404.

It has been determined in England, by decisions of high authority and upon most satisfactory reasons, that a creditor, by participating in either of the three forms of proceeding, whether by assenting to a certificate of discharge, or by consenting to a resolution, either for a winding up through trustees, or for the acceptance of a composition proposed by the debtor, does not release or affect the liability of a surety. *Browne* v. *Carr,* 2 Russ. 600; 5 Mo. & P. 497, and 7 Bing. 508. *Megrath* v. *Gray,* L. R. 9 C. P. 216. *Ellis* v. *Wilmot,* L. R. 10 Ex. 10. *Simpson* v. *Henning,* L. R. 10 Q. B. 406. *Ex parte Jacobs,* L. R. 10 Ch. 211, overruling *Wilson* v. *Lloyd,* L. R. 16 Eq. 60.

The proceedings for a composition under the statute, depending for their validity and operation, not upon the act of the particular creditor, but upon the resolution passed by the requisite majority of all the creditors, binding alike on those who do and on those who do not concur therein, (if their debts are included in the statement filed by the debtor,) and finally confirmed and established by the court upon a consideration of the general benefit of all concerned, differs wholly in nature and effect from a voluntary composition deed, which binds only those who execute it. *Oakeley* v. *Pasheller,* 4 Cl. & Fin. 207; *S. C.* 10 Bligh N. R. 548. *Bailey* v. *Edwards.* 4 B. & S. 761; *Bateson* v. *Gosling,* L. R. 7 C. P. 9; *Oriental Financial Corporation* v. *Overend,* L. R. 7 Ch. 142; *Cragoe* v. *Jones,* L. R. 8 Ex. 81; *Gifford* v. *Allen,* 3 Met. 255; *Phoenix Cotton Manuf. Co.* v. *Fuller,* 3 Allen, 441.

Assuming, therefore, that this defendant, having signed the note for the accommodation of the indorsers, was to be considered as a surety for them, and that the plaintiff, after acquiring knowledge of that fact, stood as if he had known it when he took the note, yet no defence is shown to this action.

Exceptions sustained.

GILLESPIE *et al.* *vs.* TORRANCE (1862).

25 N. Y. 306.

Appeal from the Superior Court of the city of New York. Action upon a promissory note against the indorser only. Defense, that the indorsement was for the accommodation of the maker; that the note was one of several given for oak timber sold to the maker by the plaintiffs; that the timber was a raft in the Hudson river, opposite the city of New York, and that, on making the sale, the plaintiffs produced certificates of inspection showing that there were 29,441 feet of first quality oak, for which Van Pelt, the maker of the notes, agreed to pay 27½ cents per foot, and 5,523 feet of second quality or refuse oak, for which Van Pelt agreed to pay 13¾ cents per foot; that, by the usage of the timber trade in New York, the seller is deemed to warrant that the timber sold corresponds in quantity and quality with the description in such inspection certificates; that Van Pelt gave his notes, indorsed by the defendant, for various sums, amounting in the aggregate to $9,000, the price of the timber as computed from the inspection certificates, and all of which notes had been paid except the one in suit; that after the delivery of the timber it was discovered that the inspection certificates were erroneous in this, that of the timber of first quality there was 15,000 feet less than the certificates stated, and an equal excess in the refuse timber; that if the prices had been correctly computed according to the fact, instead of being computed according to the certificate, it would have amounted to less than $5,000; that the plaintiffs had, therefore, been overpaid, and there was no consideration for the note in suit. On the trial, the judge, under exception by the defendant, excluded evidence as to the quantity of the timber of the different qualities; declined to permit an amendment of the answer alleging an express warranty: and excluded evidence of the usage set up in the answer, making a sale by certificate equivalent to a warranty. The other facts stated in the answer were substantially proved or admitted. The plaintiffs had a verdict and judgment, which having been affirmed at general term, the defendant appealed to this court.

Charles A. Rapallo, for the appellant.

William Stanley, for the respondents.

SELDEN, J. The defense in this case is not founded on a failure of the consideration of the note, otherwise than by a defect in the quality of the timber for which it was given. That being so, if there was neither warranty nor fraud in the sale of the timber, the defect in quality constitutes no defense. *Seixas* v.

Woods, 2 Caines, 48; *Sweet* v. *Colgate*, 20 Johns. 196; *Welsh* v. *Carter*, 1 Wend. 185, *Johnson* v. *Titus*, 2 Hill, 606. The answer does not allege fraud in the transaction, and unless it shows a warranty of the quality of the timber, it presents no defense to the note, either partial or total. The argument of the appellant's counsel, to maintain the position that the defense rested upon a failure of consideration, and not upon a claim for damages on a breach of warranty, is very ingenious; but the answer and the proof show that all the timber contracted to be delivered to Van Pelt, and for which the notes were given, was in fact delivered, and the real ground of complaint is, that a much larger proportion of it than was shown by the inspector's certificates, upon the faith of which the purchase was made, proved to be of inferior quality. The law being well established that such defect of quality, in the absence of fraud or warranty, constitutes no defense to the note, or to any part of it, and there being no pretence of fraud, it follows that the defense, if there is any, rests upon a breach of warranty.

The question then arises, whether the plaintiff, an accommodation indorser upon a note given by Van Pelt to the plaintiffs for the timber, can avail himself of a breach of the contract of warranty in regard to the quality of the timber, made by the plaintiffs to Van Pelt, on the sale to him. To decide this question, it is necessary to ascertain the ground upon which such defenses, by way of recoupment, as they were denominated prior to the adoption of the Code, now, partially, if not wholly, merged in the much broader term, counter-claim, were admitted. If we regard such defenses as resting upon a failure of the consideration of the contract on which the plaintiff's action is founded, then unquestionably the defendant could avail himself of the breach of warranty in this case, because an indorser or surety may always, where the contract has not been assigned, show a failure, partial or total, of consideration of his principal's contract which he is called upon to perform. But if such defenses are regarded as the setting off of distinct causes of action, one against the other, then it is clear, as will be shown hereafter, that this defendant could not avail himself of such defense.

The subject of the precise ground on which a defendant is allowed to reduce a recovery against him, in an action upon a contract, by alleging and proving fraud, or breach of warranty—whether the contract where there is fraud, is regarded as destroyed, and the recovery had on a *quantum meruit*, or whether the reduction of the plaintiffs' claim rests upon a partial failure of consideration, or upon the setting off of distinct claims against each other—has often been discussed, but without any general concurrence of opinion on the question. *Reab* v. *McAllister*, 4 Wend. 90, *et seq.; S. C.* in error, 8 id. 109; *Batterman* v. *Pierce,* 3 Hill, 171, 177; *Ives* v. *Van Epps,* 22 Wend. 155; *Nichols* v. *Dusenbury,* 2 Comst. 286; *Van Epps* v. *Harrison,* 5 Hill 66; *Barber* v. *Rose,* id. 78; *Baston* v. *Butler,* 7 East. 479; *Withers* v. *Greene,* 9 How. U. S. 213.

A careful examination of the subject, I think, must lead to the conclusion, that wherever recoupment, strictly such, is allowed, distinct causes of action are set off against each other. This would seem to follow from the right of election, which all the cases admit the defendant has, to set up his claim for damages by way of defense, or to resort to a cross-action to recover them. *Ives* v. *Van Epps,* 22 Wend. 157; *Batterman* v. *Pierce,* 3 Hill, 171; *Britton* v. *Turner,* 6 N. H. 481; *Halsey* v. *Carter,* 1 Duer, 667; *Barber* v. *Rose,* 5 Hill, 81; *Stever* v. *Lamoure,* Lalor's Supp. 352, note a.

In many cases the defendant's damages would exceed the amount of the plaintiff's claim, which shows conclusively that such damages do not rest upon a mere failure of consideration. Where there is fraud, the party deceived, on discovering the fraud, may rescind the contract; but if he does not do that, the contract on his part remains entire, not broken and not modified, and he is bound to perform it fully according to its terms; he has, however, arising from the fraud, a distinct cause of action, the amount of which he may set off against any liability on his part growing out of the transaction in which the fraud was perpetrated. As was said by *Bronson, J.,* in *Van Epps* v. *Harrison:* "When sued for the price, the vendee may in general *recoup* damages; but while he retains the property he cannot treat the contract as wholly void, and refuse to pay anything. By retaining the property he *affirms the validity of the contract,* and can be entitled to nothing more than the damages which he has sustained by reason of the fraud." The same principle is applicable to cases of warranty, except that the breach of warranty gives no right to rescind, unless there is an express contract to that effect. *Street* v. *Blay,* 2 Barn. & Ad. 456; *Voorhees* v. *Earl,* 2 Hill, 288; *Cary* v. *Gruman,* 4 id. 625; *Muller* v. *Eno,* 14 N. Y. 597; *Thornton* v. *Winn,* 12 Wheat. 183; *Lattin* v. *Davis,* Labor's Supp. 16. In ordinary cases of breach of warranty, therefore, both contracts remain binding to their full extent, and where recoupment is allowed, damages for a breach on one side are set off against like damages on the other side. The "cross-claims arising out of the same transaction compensate one another, and the balance is recovered." 8 Wend. 115; 22 id. 156; 3 Hill, 174; 2 Comst. 286.

It has always been optional, as is suggested above, since the doctrine of recoupment has gained a foothold in the courts, with a party who has sustained damages by fraud or breach of warranty in the purchase of goods, when sued for their price, to set off or recoup such damages in that action, or to reserve his claim for a cross-action; and when he elected to recoup he could not, under the Revised Statutes, have a balance certified in his favor, nor could he maintain a subsequent action for such balance. *Sickles* v. *Pattison*, 14 Wend. 257; *Batterman* v. *Pierce*, 3 Hill, 171; *Wilder* v. *Case*, 16 Wend. 583; *Stever* v. *Lamoure*, Lalor's Supp. 352, note a; *Britton* v. *Turner*, 6 N. H. 481.

Under the Code of Procedure, doubtless a balance might be recovered (Code, §§ 150-274; *Ogden* v. *Coddington*, 2 E. D. Smith, 317); but the right of election to set up a counter-claim in defence, or to bring a cross-action for it, still exists. *Halsey* v. *Carter*, 6 Duer, 667; *Welch* v. *Hazleton*, 14 How. Pr., 97. Now it is not easy to reconcile with these established principles, the right of the defendant in this suit to avail himself of the claim which Van Pelt may have against the plaintiffs on a breach of warranty. 1. Such damages constitute a counter-claim, and not a mere failure of consideration, and not being due to the defendant, cannot be claimed by him. Code, § 150; *Lemon* v. *Trull*, 13 How. Pr., 248; 16 id. 576, note. 2. Van Pelt has a right of election whether the damages shall be claimed by way of recoupment in the suit on the note, or reserved for a cross-action. The defendant cannot make this election for him. 3. If the defendant has a right to set up the counter-claim, and have it allowed, in this action it must bar any future action by Van Pelt for the breach of warranty; and as no balance could be found in defendant's favor, he might thus bar a large claim in canceling a small one. If the right exists in this case, it would equally exist if the note was but $100 instead of $1,800. 4. Supposing the other notes given for the timber to have been indorsed by different persons, for the accommodation of Van Pelt, and all to remain unpaid, each of the indorsers would have the same rights as the defendant. If they were to set up the same defence, how would the conflicting claims be reconciled?

In the case which was shown on the trial, there would seem to be a strong equity in favor of the defendant to have the note canceled or reduced, by applying towards its satisfaction the damages which appear to be due to Van Pelt for the breach of warranty. It is, however, an equity, in which Van Pelt is interested to as great, and possibly to a greater, extent than the defendant, and cannot be disposed of without having him before the court, so that his rights, as well as those of the defendant, may be protected. That remedy may be open to the defendant still, notwithstanding the judgment; especially if the insolvency of the parties renders that course necessary for his protection. 14 Johns., 63, 17 id., 389; 2 Cow., 261; 2 Paige, 581; 6 Dana, 32; 8 id., 164; 2 Story's Eq. Jur., §§ 1446, a, 1437. My conclusion is, that the court below was right in holding that the defendant could not set up the breach of warranty in defence, partial or total, to the suit on the note; and as the warranty presented the only ground on which there could be a claim of defence under the answer, there is no necessity for considering the other questions presented in the case.

The judgment should be affirmed.

All the judges concurring.

Judgment affirmed.

PEARL *vs.* DEACON (1857).

24 Beav. 186.

Mr. R. Palmer and *Mr. Bevir*, for plaintiff.

Mr. Selwyn and *Mr. R. W. Ellis*, for defendants.

THE MASTER OF THE ROLLS.

I retain the opinion expressed by me yesterday. The facts are shortly these:—Mr. Pearson applied to the defendants, who are brewers at Windsor, for a loan of 250*l.*, to enable him to take a public-house, called The Carpenters' Arms. They said we will do so if you will get a good surety for the amount, and assign over your pension and furniture. That was agreed to; Pearson offered the plaintiff as his surety for half the amount, and Castles as surety for the other half; the defendants accepted them, and on the 16th of November, 1852, two joint and several promissory notes were given to the defendants, one by Pearson and the plaintiff, and the other by Pearson and Castles. Six days afterwards, viz., on the 23rd of November, Pearson assigned his pension and all the goods and chattels to secure this debt of 250*l*. On this transaction, the first point which was raised by the plaintiff, in my opinion, fails. He says that this arrangement was a variation of the contract of suretyship, and that it discharged the plaintiff, because the money was made payable on the 16th of November, 1858, or six years after the date of the mortgage. If the case had rested here, the plaintiff would probably have been successful, but the deed goes on, "or at such earlier or other time" as the defendants should appoint for the payment thereof "in and by a notice in writing." I do not think that this was such a variation in the terms of the security as to discharge the surety; but the question is of little importance, as I am of opinion, on the evidence, that the plaintiff had notice of this assignment and of the terms of it.

The only other facts important to be stated are these:—The defendants were landlords of The Carpenters' Arms, and in the year 1856, four years after this transaction, Pearson's rent being considerably in arrear, the defendants distrained and put a broker in possession of the furniture under the distress; on this, by arrangement, instead of selling the goods, they took them at a valuation for 116*l*.

The question is this:—The furniture having been expressly mortgaged for the 250*l*., was it within the power of the defendants, to the injury of the surety, to give up the security on the furniture for the 250*l*., and take it in discharge of another and different debt due to themselves? I am of opinion that they could not do so. It was said, that this security was not within the scope of the Plaintiff's contract, and that a surety cannot go beyond it. That is a mistake with respect to the relation between a principal and surety. Lord ELDON expressly stated, in *Craythorne* v. *Swinburne*, 14 Ves. 169, that the rights of a surety depend rather on a principle of equity than upon contract; there may be a *quasi* contract, but it arises out of the equitable relation between the parties, to be inferred from the knowledge of an established principle of equity. The same doctrine is also stated in *Mayhew* v. *Crickett*, 2

Swan. 191, and it is laid down distinctly, that sureties are entitled to the benefit of every security which the creditor has against the principal debtor, and that whether the surety knows of the existence of those securities or not is immaterial. If the creditor makes available any of his securities, the surety is entitled to the benefit of it.

The case of *Capel* v. *Butler,* 2 Sim. & S. 457, is a distinct authority for this proposition. Mr. Ellis sought to distinguish that case by saying, that, in that case, there was a recital of all the securities, but that here there was none. The answer, however, is this:—That there was notice to the surety of the whole transaction, and being so, the reciting it is immaterial. Lord ELDON distinctly laid down in *Mayhew* v. *Crickett,* 2 Swan. 185, that it is a matter of perfect indifference, whether the surety is aware of another security having been taken by the creditor or not.

In the judgment of Vice-Chancellor WOOD *in Newton* v. *Charlton,* 10 Hare 651, there is a statement, in every word of which I concur. He says, as regards, the creditor, "He is bound to give to the surety the benefit of every security which he holds at the time of the contract,—every security which he then holds; and he is not allowed, in any way, to vary the position of the surety with reference to those securities; that has been decided most distinctly in *Mayhew* v. *Crickett* by Lord ELDON*,* where there was a warrant of attorney in the hands of a creditor put into operation by the creditor, and a judgment obtained, from which he afterwards discharged the principal debtor. Lord ELDON held it utterly immaterial, whether the warrant of attorney was known to the surety at the time he entered into the contract or not. The surety had a complete right to the benefit of it, and if the benefit were lost to him, he was at once discharged."

It is argued that this was a security for a separate and distinct debt; but I am of opinion that it was not taken for a separate and distinct debt, but for the debt of 250*l*.

I am of opinion, therefore, that if the defendants enforce payment of the rent due to them out of the furniture, and then seek to compel the plaintiff to pay the debt for which he became surety, the plaintiff is entitled to say to them, "you must give me the benefit of the security on the furniture and pension which were mortgaged to you for this debt."

What the defendants have done is this:—They have thought fit to apply the produce of the furniture to a different and distinct debt, contrary to the original arrangement, on the terms of which, it is to be assumed, the surety consented to become liable. I am therefore of opinion, that whatever the defendants have received ought to be applied rateably in discharge of the whole debt, and that the plaintiff is only liable to pay half of the balance.

If it were otherwise, the result would be this:—That if a man advanced 1,000*l.* to another on a mortgage of an estate, and had the security of ten sureties, each of whom was liable for 100*l,* he might release or reassign the mortgage, and then sue the ten sureties. This is a proposition impossible to be sustained.

If the defendants have received anything from Castles, it must not be taken into account; but with respect to the money received from Pearson, it ought to be taken as a discharge for the debt.

As to the pension, either they have received it or they have not; if they have, it was distinctly applicable to the payment of their debt; if they have not, they must show why they did not make that security available.

PAIN *vs.* PACKARD *et al.* (1816).

13 Johns. 174.

This was an action of *assumpsit* on a promissory note made by Packard & Munson, in which Packard alone was arrested, the other defendant being returned not found. The defendant, Packard, pleaded: 1. *Non assumpsit.* 2. That he signed the note which was for $100, payable on demand, as surety for Munson; that he urged the plaintiff to proceed immediately in collecting the money due on the note from Munson who was then solvent; and that, if the plaintiff had then proceeded immediately to take measures to collect the money of Munson, he might have obtained payment from him; but the plaintiff neglected to proceed against Munson until he became insolvent, absconded and went away out of the state, whereby the plaintiff was unable to collect the money of Munson. 3. The third plea was like the second, except that the defendant alleged a promise, on the part of the plaintiff, that he would immediately proceed to collect the money of Munson, and a breach of that promise, by which the defendant was deceived and defrauded, and prevented from obtaining the money from Munson, etc.

There was a demurrer to the second and third pleas and a joinder in demurrer, which was submitted to the court without argument.

Per Curiam. The facts set forth in the plea are admitted by the demurrer. The principles laid down in the case of *The People* v. *Jansen* (7 Johns. 336) will warrant and support this plea. We there say a mere delay in calling on the principal will not discharge the surety. The same principle was fully and explicitly laid down by the court in the case of *Tallmadge* v. *Brush*.[1] But this is not such a case. Here is a special request, by the surety, to proceed to collect the money from the principal; and an averment of a loss of the money as against the principal, in consequence of such neglect. The averments and facts stated in the plea are not repugnant, or contradictory to the terms of the note. The suit here is by the payee against the makers. The fact of Packard having been security only is fairly to be presumed to have been known to the plaintiff. He was, in law and equity, therefore bound to use due diligence against the principal in order to exonerate the surety. This he has not done. There can be no substantial objections against such a plea. It may be said, the surety might have paid the note and prosecuted the principal; but although he might have done so, he was not bound to do it. If he had a right to expedite the plaintiff in proceeding against the principal and choose to rest on that, he might do so. In the case of *Trent Nav. Co.* v. *Harley* (10 East. 34) the plea was similar to the present and not demurred to.

The defendant must, accordingly, have judgment upon the demurrer.

Judgment for the defendant.[2]

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[1] Not reported.

[2] In the courts of some states the doctrine of this case is followed without qualification; in others, with these qualifications:

a. The request of the creditor that he sue the principal debtor must be accompanied by notice that the surety will not continue to be liable if his request be ignored.

b. The request must be accompanied with an offer on the part of the surety to pay the costs of the suit or to indemnify the creditor for such costs.

c. If made before the maturity of the debt, the request will be ineffective.

The doctrine of this case is, however, repudiated by the courts of most of the states.

NATIONAL MAHAIWE BANK *vs.* PECK (1879).

127 Mass. 298.

Contract on a promissory note for $500, dated December 29, 1875, signed "Jos. A. Benjamin, Treas." payable to the order of the defendant in forty-five days after date at the plaintiff bank, and indorsed by the defendant. Trial at June term 1878 of the superior court, without a jury, before ROCKWELL, J., who reported the case for the determination of this court, in substance as follows:

Benjamin kept an ordinary banking account with the plaintiff bank. At the time of giving the note in suit, he was treasurer of the town of Egremont, and the bank gave him for this note a draft to be used for the payment of a tax due from the town. The note and the proceeds of it were not made a part of his account with the bank, and the bank regarded the note as an official or town matter.

On February 15, 1876, when this note matured, all things necessary to charge the defendant as indorser were done. On that day, and ever since, the bank held a note, made by Benjamin, which it had discounted, signed "Jos. A. Benjamin," dated November 13, 1875, for $1500, payable in three months after date at the plaintiff bank to one Callender, and indorsed by Callender. And on said February 15, there stood to the credit of Benjamin, as his balance of account, the sum of $381.10, and the same continued so to stand on the books of the bank until about six weeks before the trial, when it was indorsed as of February 16, 1876, on the note for $1500.

On February 16, 1876, the day of the maturity of the note for $1500, the president of the plaintiff bank and its principal financial manager, during business hours, told the cashier, if the $381.10 standing to Benjamin's credit was not drawn out by his checks before the close of business hours, to apply it on the $1500 note; and at the close of the bank for that day, it being found that Benjamin had drawn no checks on said balance, he again directed the cashier to apply it on the $1500 note.

On February 19, 1876, during business hours, the defendant brought to the bank a check of Benjamin, made and handed to defendant on that day, and which was as follows:

"South Egremont, Mass., Feb. 15, 1876. $381. National Mahaiwe Bank pay to the order of J. A. B., Treas., note 15th inst., three hundred and eighty-one dollars. Jos. A. Benjamin."

The defendant at the same time, acting at the request of Benjamin, tendered to the cashier of the plaintiff bank this check and $120 in money in payment of the note in suit, and demanded the note. The money had been furnished the defendant by Benjamin, but it did not appear that he informed the cashier of the bank of this fact. The cashier declined to receive the check and money, and told the defendant he could not accept the check, because he had been directed to apply the balance of Benjamin's account on another claim held by the bank, meaning the $1500 note. After this refusal, the cashier did, at the request of the defendant, receive the $120 and indorse the same on the note in suit, it being at the time understood that neither party intended thereby to waive his rights in reference to the check. The $120 have been retained by the bank.

It is not the practice of the bank to charge over-due notes held by it to the account of a depositor until he has sufficient credits to pay the note. Benjamin became a bankrupt in the spring of 1876, and died in July or August of that year.

Upon the foregoing facts, the defendant contended, as a matter of law, that the plaintiff was not entitled to recover; and the judge so ruled, and found for the defendant. If this ruling was correct, judgment was to be entered for the defendant; but if the plaintiff was entitled to recover, judgment was to be entered for him for the sum of $381.10, and interest from February 16, 1876.

J. Dewey, for the plaintiff.

M. Wilcox, for the defendant.

Gray, C. J. Money deposited in a bank does not remain the property of the depositor, upon which the bank has a lien only; but it becomes the absolute property of the bank, and the bank is merely a debtor to the depositor in an equal amount. *Foley* v. *Hill,* 1 Phillips, 399, and 2 H. L. Cas. 28. *Bank of Republic* v. *Millard,* 10 Wall. 152; *Carr* v. *National Security Bank,* 107 Mass. 45. So long as the balance of account to the credit of the depositor exceeds the amount of any debts due and payable by him to the bank, the bank is bound to honor his checks, and liable to an action by him if it does not. When he owes to the bank independent debts, already due and payable, the bank has the right to apply the balance of his general account to the satisfaction of any such debts of his. But if the bank, instead of so applying the balance, sees fit to allow him to draw it out, neither the depositor nor any other person can afterwards insist that it should have been so applied. The bank, being the absolute owner of the money deposited, and being a mere debtor to the depositor for his balance of account, holds no property in which the depositor has any title or right of which a surety on an independent debt from him to the bank can avail himself by way of subrogation, as in *Baker* v. *Briggs,* 8 Pick. 122, and *American Bank* v. *Baker,* 4 Met. 164, cited for the defendant. The right of the bank to apply the balance of account to the satisfaction of such a debt is rather in the nature of a set-off, or of an application of payments, neither of which, in the absence of express agreement or appropriation, will be required by the law to be made as to benefit the surety. *Glazier* v. *Douglass,* 32 Conn. 393; *Field* v. *Holland,* 6 Cranch, 8, 28; *Brewer* v. *Knapp,* 1 Pick. 332; *Upham* v. *Lefavour,* 11 Met. 174; *Bank of Bengal* v. *Radakissen Mitter,* 4 Moore P. C. 140, 162.

The general rule accordingly is, that where moneys drawn out and moneys paid in, or other debts and credits, are entered, by the consent of both parties, in the general banking account of a depositor, a balance may be considered as struck at the date of each payment or entry on either side of the account; but where by express agreement, or by a course of dealing, between the depositor and the banker, a certain note or bond of the depositor is not included in the general account, any balance due from the banker to the depositor is not to be applied in satisfaction of that note or bond, even for the benefit of a surety thereon, except at the election of the banker. *Clayton's case,* 1 Meriv. 572, 610; *Bodenham* v. *Purchas,* 2 B. & Ald. 39, 45; *Simpson* v. *Ingham,* 2 B. & C. 65; S. C. 3 D. & R. 249; *Pemberton* v. *Oakes,* 4 Russ. 154, 168; *Pease* v. *Hirst,* 10 B. & C. 122; S. C. 5 Man. & Ryl. 88; *Henniker* v. *Wigg,* Dav. & Meriv. 160, 171; S. C. 4 Q. B. 792, 795; *Strong* v. *Foster,* 17 C. B. 201; *Martin* v. *Mechanics Bank,* 6 Har. & Johns. 235, 244; *State Bank* v. *Armstrong,* 4 Dev. 519; *Commercial Bank* v. *Hughes,* 17 Wend. 94; *Allen* v. *Culver,* 3 Denio, 284, 191; *Voss* v. *German American Bank,* 83 Ill. 599. In the decision in *McDowell* v. *Bank of Wilmington & Brandy-*

wine, 1 Harringt. (Del.) 369, and in the *dicta* in *Dawson* v. *Real Estate Bank*, 5 Pike, 283, 298, cited for the defendant, this distinction was overlooked or disregarded.

In many of the cases, indeed, the money appears to have been deposited after the debt to the bank matured, so that the case was analogous to the ordinary one of a payment, which, not being appropriated by the debtor, might be appropriated by the creditor. But where the balance of account is in favor of the depositor when his debt to the bank becomes payable, it is a case of mutual debts and credits, which, except in proceedings in bankruptcy or insolvency, neither the depositor nor his surety has the right to require to be set off against each other. Judge LOWELL, in allowing money on deposit to the credit of a bankrupt to be set off in bankruptcy against the aggregate debt due from him to the bank, said: "This deposit, though it operates as security and as payment, was not intended for either, but is made so by the bankruptcy of the debtor." *In re North*, 2 Lowell, 487. See, also, *Demmon* v. *Boylston Bank*, 5 Cush. 194; *Strong* v. *Foster*, 17 C. B. 217.

In *Strong* v. *Foster*, a depositor gave to his bankers a promissory note with a surety, which was not entered in his general banking account; and it was held, that the surety, when sued by the bankers on the note, could not set up, either as payment or by way of equitable defense, that shortly after the note matured the balance of account was in favor of the depositor to a greater amount, and the plaintiff's did not apply that balance in discharge of the note, or inform the defendant for three years afterwards that the note remained unpaid. But the reasoning of the court applies quite as strongly when the balance in favor of the depoistor exists at the time when his debt becomes payable, as when it is created by subsequent deposits. Chief Justice Jervis said: "Here the note was never entered in the account at all; the rule as to adjusting balances therefore does not apply." "It would be essentially altering the position of parties, to establish that, because a banker, who holds a note of a third person for a customer, has a balance in his hands in the customer's favor at the maturity of the note, such third person is thereby discharged, if it turns out that the note was given by him as surety. There is no authority in equity for any such position, and none certainly in law." 17 C. B. 216, 217. And Mr. Justice Willes observed: "As to what was said on the part of the defendant, that, if a set-off arises between the creditor and the principal debtor, the liability on the surety of the note is extinguished; that doctrine would lead to singular results. These securities are often given to increase credits of bankers to their customers If the liability of the maker were to depend upon the state of the customer's account at any one moment, he might never undergo the liability contemplated at all. The security is given without any reference to the other side of the account. This is the first time, I believe, that it has ever been suggested, that when a note given under circumstances like these falls due, and there is a balance in favor of the customer at the time, that balance must of necessity be applied to the discharge of the note." 17 C. B. 224. Even the usual inference from the entry of such a note in the account may be controlled by other circumstances. *City Discount Co.* v *McLean*, L. R. 9 C. P. 692.

In the case at bar, it appears that the consideration received by Benjamin from the plaintiff bank for the note in suit was to be used by him in his official capacity as town treasurer, the note was regarded by the bank as an official or town matter, and neither the note nor its consideration was ever made part of his general banking account; and that, when the check in favor of the defendant was drawn by Benjamin and presented at the bank, the bank held a personal note of Benjamin, overdue and exceeding in amount the balance of account is in his favor at the time, the president of the bank had directed the cashier to apply this balance to the latter's note, and the cashier so informed the defendant when he presented the check. Under these circumstances, neither Benjamin, the maker, nor the defendant, the indorser, has the right to insist that this balance of account should be applied to the satisfaction of the note in suit, rather than of the other note of Benjamin; and, according to the terms of the report, there must be

Judgment for the plaintiff.

DAVIS *et al.*, Plffs. in Err., *vs.* WELLS, FARGO & COMPANY (1881).
104 U. S. 164; L. Ed'n, Book 26, 686.

In error to the Supreme Court of the Territory of Utah.

Mr. *James M. Woolworth,* for plaintiffs in error.

Messrs. *Shellabarger & Wilson,* for defendants in error.

Mr. Justice MATTHEWS delivered the opinion of the court:

The action below was brought by Wells, Fargo & Co., against the plaintiffs in error, upon a guaranty, in the following words:

> "For and in consideration of one dollar to us in hand paid by Wells, Fargo & Co. (the receipt of which is hereby acknowledged), we hereby guarantee unto them, the said Wells, Fargo & Co., unconditionally at all times, any indebtedness of Gordon & Co., a firm now doing business at Salt Lake City, Territory of Utah, to the extent of and not exceeding the sum of ten thousand dollars ($10,000) for any overdrafts now made, or that may hereafter be made, at the bank of said Wells, Fargo & Co.
>
> This guaranty to be an open one, and to continue one at all times to the amount of ten thousand dollars, until revoked by us in writing.
>
> Dated, Salt Lake City, 11th November, 1874.
>
> In witness whereof we have hereunto set our hands and seals the day and year above written.
>
> ERWIN DAVIS. [seal]
> J. N. H. PATRICK. [seal]
>
> Witness: J. GORDON."

The answer set up, by way of defense, that there was no notice to the defendants from the plaintiffs of their acceptance of the guaranty, and their intention to act under it; and no notice, after the account was closed, of the amount due thereon; and no notice of the demand of payment upon Gordon & Co., and of their failure to pay within a reasonable time thereafter.

But there was no allegation that by reason thereof any loss or damage had accrued to the defendants.

On the trial it was in evidence that this guaranty was executed by the defendants below and delivered to Gordon on the day of its date, for delivery by him to Wells, Fargo & Co., which took place on the same day; that Gordon & Co. were then indebted to the plaintiffs below for a balance of over $9,000 on their bank account; that their account continued to be overdrawn, Wells, Fargo & Co. permitting it on the faith of the guaranty, from that time till July 31, 1875, when it was closed, with a debit balance of $6,200; that the account was stated and payment demanded at that time of Gordon & Co., who failed to make payment; that a formal notice of the amount due and demand of payment was made by Wells, Fargo & Co., of the defendants below, on May 26, 1876, the day before the action was brought. There was no evidence of any other notice having been given in reference to it; either that Wells, Fargo & Co. accepted it and intended to rely upon it, or of the amount of the balance due at or after the account was closed; and no evidence was offered of any loss or damage to the defendants by reason thereof, or in consequence of the delay in giving the final notice of Gordon & Co.'s default.

The defendant's counsel requested the court, among others not necessary to refer to, to give to the jury the following instructions, numbered, first, second, third and fifth:

1. If the jury believes from the evidence that the guaranty sued upon was delivered by the defendants to Joseph Gordon, and not to the plaintiff, but was afterwards delivered to the latter by Joseph Gordon, or by Gordon & Co., it became and was the duty of Wells, Fargo & Co. thereupon to notify the defendants of the acceptance of said guaranty, and their intention to make advancements on the faith of it, and, if they neglected or failed so to do, the defendants are not liable on the guaranty, and your verdict must be for the defendants.

2. If Wells, Fargo & Co. made any advancements to Gordon & Co. on overdrafts on the faith of said guaranty, it became and was the duty of plaintiff to notify the defendants, within a reasonable time after the last of said advancements, of the amount advanced under the guaranty, and if the plaintiff failed or neglected so to do, it cannot recover under the guaranty, and your verdict must be for the defendants.

3. What is a reasonable time in which notice should be given is a question of law for the court. Whether notice was given is one of fact for the jury. The court, therefore, instructs you that if notice of the advancements made under said guaranty was not given until after the lapse of twelve months or upward from the time the last advancement was made to Gordon & Co., this was not, in contemplation of law, a reasonable notice, and your verdict, if you so find the fact to be, should be for the defendants.

5. Before any right of action accrued in favor of plaintiff under said guaranty, it was incumbent on it to demand payment of the principal debtor, Gordon & Co., and, on their refusal to pay, to notify the defendants. If the jury, therefore, find that no such demand was made, and no notice given to the defendants, the plaintiff cannot recover upon the guaranty.

The court refused to give each of these instructions, and the defendants excepted.

The following instructions were given by the court to the jury, to the giving of each of which the defendants excepted:

1. You are instructed that the written guaranty offered in evidence in this case is an unconditional guaranty by defendants, of any and all overdrafts, not exceeding in amount $10,000, for which said Gordon & Co. were indebted to the plaintiff at the date of the commencement of this suit. If the jury believe from the evidence that said guaranty was by said defendants, or by any one authorized by them to deliver the same, actually delivered to plaintiff, and that plaintiff accepted and acted on the same, such delivery, acceptance and action thereon by plaintiff bind the defendants, and render the defendants responsible in the action for all overdrafts upon plaintiff made by Gordon & Co., at the date of and since the date of said delivery of said guaranty, and which were unpaid at the date of the commencement of this suit, not exceeding $10,000.

2. The jury are instructed that the written document under seal, offered in evidence in this case, implies a consideration, and constitutes an unconditional guaranty of whatever overdraft, if any, not exceeding $10,000, which the jury may find from the evidence that Gordon & Co. actually owed the plaintiff at the date of the bringing of this suit; and further, if you believe from the evidence that an account was stated of such overdraft between plaintiff and J. Gordon & Co., then the plaintiff is entitled to interest on the amount found due at such statement, from the date thereof, at the rate of ten per cent per annum.

These exceptions form the basis of the assignment of errors.

The charge of the court first assigned for error, and its refusal to charge upon the point as requested by the plaintiffs in error, raises the question whether the guaranty becomes operative if the guarantor be not within a reasonable time informed by the guarantee of his acceptance of it and intention to act under it.

It is claimed in argument that this has been settled in the negative by a series of well considered judgments of this court.

It becomes necessary to inquire precisely what has been thus settled, and what rule of decision is applicable to the facts of the present case.

In *Adams* v. *Jones,* 12 Pet. 213, *Mr. Justice Story,* delivering the opinion of the court, said: "And the question which, under this view, is presented, is whether, upon a letter of guaranty, addressed to a particular person or to persons generally, for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor that the person giving the credit has accepted or acted upon the guaranty and given the credit on the faith of it; we are all of the opinion that it is necessary and this is not now an open question in this court, after the decisions which have been made in *Russell* v. *Clark,* 7 Cranch, 69; *Edmonston* v. *Drake,* 5 Pet. 624; *Douglass* v. *Reynolds,* 7 Pet. 113; *Lee* v. *Dick,* 10 Pet. 482; and again recognized at the present term in the case of *Reynolds* v. *Douglass,* 12 Pet. 497. It is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability, to exercise due vigilance in guarding himself against losses which might otherwise be unknown to him, and to avail himself of the appropriate means in law and equity to compel the other parties to discharge him from further responsibility. The reason applies with still greater force to cases of a general letter of guaranty, for it might otherwise be impracticable for the guarantor to know to whom and under what circumstances the guaranty attached, and to what period it might be protracted. Transactions between the other parties to a great extent might from time to time exist, in which credits might be given and payments might be made, the existence and due appropriation of which might materially affect his own rights and security. If, therefore, the questions were entirely new, we should not be disposed to hold a different doctrine; and we think the English decisions are in entire conformity to our own."

In *Reynolds* v. *Douglass,* 12 Pet. 504, decided at the same term and referred to in the foregoing extract, *Mr. Justice McLean* stated the rule to be "That, to entitle the plaintiffs to recover on said letter of credit, they must prove that notice had been given in a reasonable time after said letter of credit had been accepted by them, to the defendants, that the same had been accepted"; and added, "This notice need not be proved to have been given in writing or in any particular form, but may be inferred by the jury from facts and circumstances which shall warrant such inference."

There seems to be some confusion as to the reason and foundation of the rule and, consequently, some uncertainty as to the circumstances in which it is applicable. In some instances it has been treated as a rule, inhering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it, in order to constitute a binding promise; in others it has been considered as a rule springing from the peculiar nature of the contract of guaranty, which requires, after the formation of the obligation of the guarantor, and as one of its incidents, that notice should be given of the intention of the guarantee to act under it as a condition of the promise of the guarantor.

The former is the sense in which the rule is to be understood as having been applied in the decisions of this court. This appears very plainly, not only from a particular consideration of the cases themselves, but was formally declared to be so by *Mr. Justice Nelson*, speaking for the court in delivering its opinion in the case of *Manufacturing Co.* v. *Welch*, 10 How. 475, where he uses this language:

"He (the guarantor) has already had notice of the acceptance of the guaranty and of the intention of the party to act under it. The rule requiring this notice within a reasonable time after the acceptance is absolute and imperative in this court, according to all the cases; *it is deemed essential to an inception of the contract;* he is, therefore, advised of his accruing liabilities upon the guaranty, and may very well anticipate or be charged with notice of an amount of indebtedness to the extent of the credit pledged."

And in *Wilds* v. *Savage*, 1 Story, 22, *Mr. Justice* Story, who had delivered the opinion in the case of *Douglass* v. *Reynolds*, 7 Pet. 113, after stating the rule requiring notice by the guarantee of his acceptance, said: "This doctrine, however, is inapplicable to the circumstances of the present case; for the agreement to accept was contemporaneous with the guaranty, and, indeed, constituted the consideration and basis thereof."

The agreement to accept is a transaction between the guarantee and guarantor, and completes that mutual assent necessary to a valid contract between the parties. It was, in the case cited, the consideration for the promise of the guarantor. And whereever a sufficient consideration of any description passes directly between them, it operates in the same manner and with like effect. It establishes a privity between them and creates an obligation. The rule in question proceeds upon the ground that the case in which it applies is an offer or proposal on the part of the guarantor, which does not become effective and binding as an obligation until accepted by the party to whom it is made; that until then it is inchoate and incomplete and may be withdrawn by the proposer. Frequently the only consideration contemplated is, that the guarantee shall extend the credit and make the advances to the third person, for whose performance of his obligation on that account, the guarantor undertakes. But a guaranty may as well be for an existing debt, or it may be supported by some consideration distinct from the advance to the principal debtor, passing directly from the guarantee to the guarantor. In the case of the guaranty of an existing debt, such a consideration is necessary to support the undertaking as a binding obligation. In both these cases, no notice of assent, other than the performance of the consideration, is necessary to perfect the agreement; for, as Prof. Langdell has pointed out in his Summary of the Law of Contracts (Langdell Cas. on Cont., 987), "Though the acceptance of an offer and the performance of the consideration are different things, and though the former does not imply the latter, yet the latter does necessarily imply the former; and as the want of either is fatal to the promise, the question whether an offer has been accepted can never, in strictness, become material in those cases in which a consideration is necessary; and for all practical purposes it may be said that the offer is accepted in such cases by giving or performing the consideration."

If the guaranty is made at the request of the guarantee, it then becomes the answer of the guarantor to a proposal made to him, and its delivery to or for the use of the guarantee completes the communication between them and constitutes a contract. The same result follows, as declared in *Wilds* v. *Savage, supra*, where the agreement to accept is contemporaneous with the guaranty, and constitutes its consideration and basis. It must be so wherever there is a valuable consideration, other than the expected advances to be made to the principal debtor, which passes at the time the undertaking is given from the guarantee to the guarantor, and equally so where the instrument is in the form of a bilateral contract, in which the guarantee binds himself to make the contemplated advances, or which otherwise creates, by its recitals, a privity between the guarantee and the guarantor. For in each of these cases, the mutual assent of the parties to the obligation is either expressed or necessarily implied.

The view we have taken of the rule under consideration, as requiring notice of acceptance and of the intention to act under the guaranty, only when the legal effect of the instrument is that of an offer or proposal, and for the purpose of completing its obligation as a contract, is the one urged upon us by the learned counsel for the plaintiff in error, who says, in his printed brief:

"For the ground of the doctrine is not that the operation of the writing is conditional upon notice, but it is, that until it is accepted and notice of its acceptance given to the guarantor, there is no contract between the guarantor and the guarantee; the reason being that the writing is merely an offer to guaranty the debt of another, and it must be accepted and notice thereof given to the party offering himself as security before the minds meet and he becomes bound. Until the notice is given, there is a want of mutuality; the case is not that of an obligation on condition, but of an offer to become bound not accepted; that is, there is not a conditional contract, but no contract whatever."

It is thence argued that the words in the instrument which is the foundation of the present action—"we hereby guarantee unto them, the said Wells, Fargo & Co., *unconditionally, at all times*, etc."—cannot have the effect of waiving the notice of acceptance, because they can have no effect at all except as the words of a contract, and there can be no contract without notice of acceptance. And on the supposition that the terms of the instrument constitute a mere offer to guaranty the debts of Gordon & Co., we accept the conclusion as entirely just.

But we are unable to agree to that supposition. We think that the instrument sued on is not a mere unaccepted proposal. It carries on its face conclusive evidence that it has been accepted by Wells, Fargo & Co., and that it was understood and intended to be, on delivery to them, as it took place, a complete and perfect obligation of guaranty. That evidence we find in the words—"for and in consideration of one dollar, to us paid by Wells, Fargo & Co., the receipt of which is hereby acknowledged, we hereby guarantee," etc. How can that recital be true, unless the covenant of guaranty had been made with the assent of Wells, Fargo & Co., communicated to the guarantors? Wells, Fargo & Co. had not only assented to it, but had paid value for it, and that into the very hands of the guarantors, as they by the instrument itself acknowledge.

It is not material that the expressed consideration is nominal. That point was made, as to a guarantee, substantially the same as this, in the case of *Lawrence* v. *McAlmont*, 2 How. 452, and was overruled. Mr. Justice STORY said:

"The guarantor acknowledged the receipt of the one dollar and is now estopped to deny it. If she has not received it, she would now be entitled to recover it. A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract; and this is equally true as to contracts of guarantee as to other contracts. A stipulation in consideration of one dollar is just as effectual and valuable a consideration as a larger sum stipulated for or paid. The very point arose in *Dutchman* v. *Tooth*, 5 Bing. (N. C.), 577, where the guarantor gave a guaranty for the payment of the proceeds of the goods the guarantee had consigned to his brother, and also all future shipments the guarantee might make in consideration of two shillings and sixpence, paid him, the guarantor. And the court held the guaranty good, and the consideration sufficient."

It is worthy of note that in the case from which this extract is taken the guaranty was substantially the same as that in the present case, and that no question was made as to a notice of acceptance. It seems to have been treated as a complete contract by force of its terms.

It does not affect the conclusion, based on these views, that the present guaranty was for future advances as well as an existing debt. It cannot, therefore, be treated as if it were an engagement, in which the only consideration was the future credit solicited and expected. The recital of the consideration paid by the guarantee to the guarantor shows a completed contract, based upon a mutual assent of the parties; and if it is a contract at all, it is one for all the purposes expressed in it. It is an entirety and cannot be separated into distinct parts. The covenant is single and cannot be subjected in its interpretation to the operation of two diverse rules.

Of course the instrument takes effect only upon delivery. But in this case no question was or could be made upon that. It was admitted that it was delivered to Gordon for delivery to the plaintiffs below, and that Gordon delivered it to them.

But if we should consider that, notwithstanding the completeness of the contract as such, the guaranty of future advances was subject to a condition implied by law that notice should be given to the guarantor that the guarantee either would or had acted upon the faith of it, we are led to inquire, what effect is to be given to the use of the words which declare that the guarantors thereby "Guarantee unto them, the said Wells, Fargo & Co., *unconditionally, at all times*, any indebtedness of Gordon & Co., etc., to the extent and not exceeding the sum of $10,000, for any overdrafts now made, or that hereafter may be made, at the bank of said Wells, Fargo & Co."

Upon the supposition now made, the notice alleged to be necessary arises from the nature of such a guaranty. It is not, and cannot be, claimed that such a condition is so essential to the obligation that it cannot be waived. We do not see, therefore, what less effect can be ascribed to the words quoted than that all conditions that otherwise would qualify the obligation are by agreement expunged from it and made void. The obligation becomes thereby absolute and unqualified; free from all conditions whatever. This is the natural, obvious and ordinary meaning of the terms employed, and we cannot doubt that they express the real meaning of the parties. It was their manifest intention to make it unambiguous that Wells, Fargo & Co., for any indebtedness that might arise to them in consequence of overdrafts by Gordon & Co., might securely look to the guarantors without the performance on their part of any conditions precedent thereto whatever.

It has always been held in this court that, notwithstanding the contract of guaranty is the obligation of a surety, it is to be construed as a mercantile instrument in furtherance of its spirit and liberally to promote the use and convenience of commercial intercourse.

This view applies with equal force to the exceptions to the other charges and refusals to charge of the court below. These exceptions are based on the propositions:

1. That if Wells, Fargo & Co. neglected to notify the defendants below of the amount of the overdraft within a reasonable time after closing the account of Gordon & Co.; and

2. That if they failed within a reasonable time after demand of payment made upon Gordon & Co., to notify the defendants of the default, the plaintiffs could not recover upon the guaranty.

For, if the necessity in either or both of these contingencies existed, to give the notice specified, it was because the duty to do so was, by construction of law, made conditions of the contract.

But by its terms, as we have shown, the contract was made absolute, and all conditions waived.

It is undoubtedly true, that if the guarantee fails to give reasonable notice to the guarantor of the default of the principal debtor, and loss or damage thereby ensues to the guarantor, to that extent the latter is discharged; but both the laches of the plaintiff and the loss of the defendant must concur to constitute a defense.

If any intermediate notice, at the expiration of the credit, of the extent of the liability incurred is requisite, the same rule applies. Such was the expressed decision of this court in the case of *Manufacturing Co.* v. *Welch (supra).* An unreasonable delay in giving notice, or a failure to give it altogether, is not a bar, of itself.

There was a question made at the trial, as to the meaning of the word "overdrafts," as used in the guaranty; and it was contended that it would not include the debit balance of accounts charged to Gordon & Murray, and assumed by Gordon & Co., as their successors, before the guaranty was made, nor charges of interest accrued upon the balances of Gordon & Co.'s account, which were entered to the debit of the account. The reason alleged was, that no formal checks were given for these amounts. The point was not urged in argument at the bar, and was very properly abandoned. The charges were legitimate and correct, and the balance of the account to the debit of Gordon & Co. was the overdraft for which they were liable. There could be no doubt that it was embraced in the guaranty.

We find no error in the record, *and the judgment is affirmed.*

HUNGERFORD *vs.* O'BRIEN, impleaded, etc., (1887).

37 Minn. 306; 34 N. W. 161.

The plaintiff brought this action in the district court for Otter Tail county upon a promissory note made by the defendant Charles J. Sawbridge, the payment of which was guarantied by the defendant O'Brien. The action was tried before BAXTER, J., and a jury, and a verdict directed for plaintiff. Defendant O'Brien appeals from an order refusing a new trial.

Rawson & Houpt, for appellant.

E. E. Corliss, for respondent.

DICKINSON, J. The defendant Sawbridge made his negotiable promissory note, which was indorsed to one Gage, who indorsed it in blank to the defendant O'Brien, and he, before maturity, transferred it for value to the plaintiff, indorsing upon the note and signing this guaranty: "For value, I hereby guaranty the payment of the within note to Cassie Hungerford or bearer." The note was not paid. Nothing was done by the plaintiff at the maturity of the note to fix the liability of the indorser Gage. The defendant O'Brien had no notice of the non-payment of the note until more than a year after its maturity. Upon the trial of the issue raised by the answer of the defendant O'Brien, evidence was presented tending to show that the maker of the note was solvent at the time of its maturity, but has since become insolvent; and that the indorser, Gage, was also solvent. The court directed a verdict for the plaintiff.

The nature of the obligation of the guarantor is affected by the character of the principal contract to which the guaranty relates. The note expressed the absolute obligation of the maker to pay the sum named at the specified date of maturity or before. The guaranty of "the payment of the within note" imported an undertaking, without condition, that, in the event of the note not being paid according to its terms,—that is, at maturity,—the guarantor should be responsible. The non-payment of the note at maturity made absolute the liability of the guarantor, and an action might at once have been maintained against him without notice or demand. Such was the effect of the unqualified guaranty of the payment of an obligation which was in itself absolute and perfect and certain as respects the sum to be paid, and the time when payment should be made,—all of which was known to the guarantor, and appears upon the face of the contract. The liability of the guarantor thus becoming absolute by the non-payment of the note, the neglect of the holder to pursue such remedies as he might have against the maker (the guarantor not having required him to act) would not discharge the already fixed and absolute obligation of the guarantor, nor would neglect to notify the guarantor of the non-payment have such effect. *Brown* v. *Curtiss,* 2 N. Y. 225; *Allen* v. *Rightmere,* 20 John. 365, (11 Am. Dec. 288); *Newcomb* v. *Hale,* 90 N. Y. 326; *Read* v. *Cutts,* 7 Greenl. 186, (22 Am. Dec. 184); *Breed* v. *Hillhouse,* 7 Conn. 523; *Campbell* v. *Baker,* 46 Pa. St. 243; *Roberts* v. *Riddle,* 79 Pa. St. 468; *Bank* v. *Sinclair,* 60 N. H. 100; *Heaton* v. *Hulbert,* 3 Scam. 489; *Dickerson* v. *Derrickson,* 39 Ill. 574; *Penny* v. *Crane Mfg. Co.,* 80 Ill. 244; *Clay* v. *Edgerton,* 19 Ohio St. 549; *Wright* v. *Dyer,* 48 Mo.

525. See, also, *Vinal* v. *Richardson*, 13 Allen 521, modifying former decisions of the same court.

It follows that the fact that the maker had become insolvent since maturity, or that a mortgage security had become impaired by depreciation in the value of the property, was no defence; nor was it a defence that the guarantor was not notified of the non-payment of the note. We are aware that the position here taken is opposed by some decisions. No valid agreement was shown between the maker and the plaintiff extending the time of payment. From the position above taken, it logically follows that the neglect of the guarantee to take the steps necessary to fix the liability of the indorser, Gage, did not discharge the guarantor. The latter, by his unqualified guaranty of the payment of the note, took it upon himself to see that the note was paid, and was therefore not entitled to notice of its non-payment. (Authorities above cited.) For the same reason, the plaintiff did not owe to the guarantor the duty of taking the steps necessary to fix the contingent liability of the indorser by demand and notice of dishonor. *Philbrooks* v. *McEwen,* 29 Ind. 347; *Lang* v. *Brevard,* 3 Strob. Eq. (So. Car.) 59; *Pickens* v. *Finney,* 12 Smedes & M. 468; 2 Lead. Cas. Eq., notes to *Rees* v. *Berrington.* No such obligation is involved in this contract of guaranty. Even in the case of an ordinary indorsement, the holder, at maturity, is under no obligation to his indorser to give notice of dishonor to prior indorsers or parties. The last indorser becomes liable when he alone is notified, and he in turn may fix the liability of prior parties by giving notice to them.

Order affirmed.

Mitchell, J., (*dissenting*). I am unable to concur in the proposition that the plaintiff owed no duty to O'Brien to take steps, at the maturity of the note, to fix the liability of Gage, the indorser. It does not seem to me that the fact that O'Brien's guaranty of payment was unconditional and absolute is at all decisive of the question. As between the parties to this action, O'Brien occupied the position of surety, who, in case he had to pay the note, would have recourse against Gage, the indorser, *provided* steps were taken to fix the liability of the latter. The question, therefore, is to be determined by the equitable principles which govern the relative rights and duties of creditor and surety.

It is a well-settled rule of equity that any laches by the creditor in the care or management of collateral remedies or securities, if loss ensues, will discharge the surety *pro tanto*. *Nelson* v. *Munch*, 28 Minn. 314. 322 (9 N. W. Rep. 863). As a surety, on payment of the debt, is entitled to all the securities of the creditor, if, through the negligence of the creditor who has them in his possession and under his control, a security, to the benefit of which the surety is entitled, is lost or not properly perfected, the surety, to the extent of such security, will be discharged. *Wulff* v. *Jay,* L. R. 7 Q. B. 756. And we can see no difference in this respect whether the security is chattel or personal. This is not a case of mere passiveness by the creditor in not taking steps to enforce collection of the debt at maturity, but an omission to take steps to perfect and fix the liability of the indorser, which amounted to positive negligence. He had possession and control of the note on the day of its maturity, and consequently was the only person who could present it for payment, or who would know whether or not it was paid, and hence was the only person in position to give notice to the indorser in case of its non-payment. To require him to do this, would, I think, be both good business morals and good law.

THE STATE, USE OF HOLMES COUNTY, *vs.* SWINNEY *et al.* (1882).

60 Miss. 39.

Appeal from the circuit court of Holmes county.

HON. C. H. CAMPBELL, J. On the 13th of March, 1882, an action was brought in the name of the State, suing for the use of Holmes County, against J. S. Hoskins and his sureties, on his bond as tax collector of that county, for two several sums of money, for the years 1876 and 1877 respectively, which, it was declared, he had collected and failed to pay over to the treasurer of the county as the law required of him and as he was bound by the terms of his bond to do.

The third plea set up the defence that, "after the signing of said bond by said defendants, the said plaintiff, without the consent of the said defendants, on the twelfth day of January, 1877, by an act of the Legislature of the State of Mississippi, approved on said day and entitled 'An act to provide for the collection of the outstanding revenue for the fiscal year 1876,' altered, changed, and extended the time for the collection of taxes due the State of Mississippi and the county of Holmes, and the time for the payment thereof by the said Hoskins to the State and county treasuries; whereby said defendants were released as sureties on said bond."

The fourth plea contained the same defence as the third, except that the act of the legislature relied upon in the latter as releasing the defendants as sureties on the bond was an act entitled: "An act in relation to the public revenue and for other purposes," approved February 1, 1877. To the third and fourth pleas demurrers were filed and they, too, were overruled. The plaintiff declined to plead over and appealed to this court.

C. V. Gwin, for the appellant.

H. S. Hooker, for the appellees.

CAMPBELL, C. J., delivered the opinion of the court.

We decline to follow the courts of Illinois, Tennessee and Missouri, in their views that sureties on the bond of a tax collector are discharged by an act of the legislature passed after the execution of the bond, without their consent, giving further time for the collection of taxes and settlement by the officer, and we embrace and declare the more just and politic doctrine of the courts of Virginia, Maryland, and North Carolina, and hold that the official bond of the tax collector is given with a full knowledge of the right of the legislature to alter the dates fixed by law for the collection of taxes and the setttlement of the collector, and subject to the exercise of that right at the pleasure of the legislature, without the assent of the sureties. *The Commonwealth* v. *Holmes*, 25 Gratt. 771; *Smith* v. *The Commonwealth*, 25 Gratt. 780; *The State* v. *Carleton*, 1 Gill, 249; *Prairie* v. *Worth,* 78 N. C. 169. See also *Smith* v. *Peoria*, 59 Ill. 412; *Bennett* v. *The Auditor*, 2 W. Va. 441; Cooley on Tax, 502.

The demurrer to the third and fourth pleas should have been sustained.

McCONNELL *vs.* POOR (1901).

113 Iowa, 133; 84 N. W. 968; 52 L. R. A. 312.

Appeal by plaintiff from a judgment of the district court for Des Moines County in favor of defendant in an action brought upon a contractor's bond. *Affirmed.*

Statement by LADD, J. Evans entered into a contract with plaintiff, July 14, 1891, to construct a dwelling house for him, and on the same day executed a bond with defendant as surety conditioned "that, if the said Evan F. Evans shall duly perform said contract, then this obligation is to be void, but, if otherwise, the same to be and remain in full force and virtue." The house was built and in 1892 Evans began an action against the plaintiff for a balance due. McConnell filed a cross petition in which he averred several breaches of the contract and prayed for damages. The result was a judgment against Evans for $943, to recover which this action was brought against the defendant as surety on the bond. By way of defense, he pleaded alterations in the contract in four particulars: (1) That the work was done under the direction of McConnell, instead of Sunderland, the architect, as agreed: (2) the broken ashlar work was constructed with close joints, instead of being tuck pointed, as stipulated; (3) the increased cost occasioned by this change was not estimated at the rate at which the work was taken, and added to the amount to be paid as exacted by the terms of the contract; and (4) other changes were made without estimating the increased cost, as required in the agreement. To these defenses the plaintiff pleaded adjudication in Evans against McConnell as an estoppel. The defendant also answered that he had advanced, in payment of labor and material, with McConnell's knowledge and consent, a large amount of money, and was released from liability on the bond to that extent. Trial to jury and from judgment on a verdict against him, the plaintiff appeals.

LADD, J., delivered the opinion of the court:

A. M. Antrobus and *Seerley & Clark* with *C. L. Poor, in propria persona* for appellee.

LADD, J., delivered the opinion of the court.

How far will a surety on a bond be bound by a judgment against his principal alone? There is no little confusion in the language of the courts on this subject, and entire harmony does not prevail in the decisions. This has resulted sometimes in treating such a judgment as *res judicata* in an action against the surety, rather than passing on the character of the contract, and simply holding him to its performance. It is a fundamental principle in jurisprudence that every man shall have his day in court, and shall be heard in his own defense, and of this right he may not, under the constitution and laws of this state, be deprived. For this reason, judgment against the principal may never foreclose investigation of the surety's liability, unless by virtue of the latter's undertaking, he has obligated himself directly or by implication to be bound thereby. Where, by the terms of the bond, the surety is to be bound by the litigation to which he is not a party, the courts decide, not that the judgment is an adjudication, because of the connection, but that he must perform the contract as it is written. *Shenandoah Nat. Bank* v. *Reed*, 86 Ia. 136, 53 N. W. 96. The only ground on which sureties on official bonds generally may be regarded as bound by the judgments against their principals is that the sureties by the terms of the bond agree, expressly or impliedly, to abide the result of litigation against their principals. This principle is well stated in *Stephens* v. *Shafer,* 48 Wis. 54, 33 Am. Rep. 796, 3 N. W. 835. "The nature of the contract in official bonds is that of a bond of indemnity to those who may suffer damages by reason of the neglect, fraud, or misconduct of the officer." The bond is made with the full knowledge and understanding that, in many cases, such damages must be ascertained and liquidated by an action against the officer for whose acts the sureties make themselves liable, and the fair construction of the contract of the sureties is that they will pay all damages so ascertained and liquidated in an action against their principal. See also *Masser* v. *Strickland,* 17 Serg. & R. 354, 17 Am. Dec. 668. This court held in *Charles* v. *Hoskins*, 14 Ia. 471, 83 Am. Dec. 378, that judgment against a sheriff might be received in evidence as fixing, *prima facie,* the liability of the surety. True, other reasons for so holding than here suggested were assigned. But the doctrine of *stare decisis* has no application to the reasons given for reaching the conclusion; it is limited to the very point decided. The fallacy in the reasoning of that case, as well as *Lowell* v. *Parker*, 10 Met. 309, 43 Am. Dec. 436, on which it was based, lies in supposing that, because the surety may claim the benefit of a judgment in favor of his principal, it follows that he is concluded by one against him. But the surety is discharged by a finding for his principal, not owing to the creditor being estopped, but for that it establishes the absence of liability of the principal; and, if he is not liable, the surety cannot be, as his obligation is merely incidental to that of the principal. Besides, the discharge of the principal does not always release the surety. If the former be an infant when executing an instrument, and is discharged on that ground, the surety may yet be held. *Keokuk County State Bank* v. *Hall,* 106 Ia. 540, 76 N. W. 832. To the point is this language, found in *Jackson* v. *Griswold*, 4 Hill, 528: "No doubt* * * * * * a decision against the debt would discharge him [the surety]. That, however, is not on the ground that he is a party, but because the judgment or decree extinguishes the debt; and, the principal thing being thus destroyed, the incident—the obligation of the surety—is destroyed with it. The effect is the same as a release by the creditor or a payment by the debtor."

It is sometimes urged that as the surety has become responsible for the debt or good conduct of the principal, judgment establishes the fact on which the surety's liability rests. A complete answer to this is that the fact has not been established against the surety, because he has been afforded no opportunity to litigate the question. Under the civil law, the surety was permitted to defend, and even allowed to prosecute an appeal from the judgment against the principal, though not a party to the judgment. As he was given his day in court, there appears no serious objection to binding him by the litigation. Much of the confusion in the decisions seems to have resulted from the attempt to apply the rule of the civil law binding the surety by the litigation against the principal, without allowing the former the participation there accorded. We have called attention to the inapplicability of the doctrine of estoppel in such cases, as the appellant, with much propriety, has insisted that, if applicable at all logically, it must extend to bonds in private transactions. The better opinion and the voice of authority is the other way, and a judgment against the principal is entitled to no consideration as against the surety, unless by the terms of the contract the surety is to be bound thereby. *Giltinan* v. *Strong*, 64 Pa. 244; *Fletcher* v. *Jackson*, 23 Vt. 581, 56 Am. Dec. 98; *Arrington* v. *Porter*, 47 Ala. 714; *Douglass* v. *Howland*, 24 Wend. 35; *De Greiff* v. *Wilson,* 30 N. J. Eq. 437; *Firemen's Ins. Co.* v. *McMillan,* 29 Ala. 147; *Jackson* v. *Griswold*, 4 Hill, 528; 2 Van Fleet, Former Adjudication, § 567; 2 Black Judgm. § 592.

In *Fletcher* v. *Jackson,* 23 Vt. 581, 56 Am. Dec. 98, the court, speaking through Redfield, J., said: "The general rule undoubtedly is that, in a collateral undertaking by way of guaranty, where a suit is necessary to fix the liability of the guarantor, the first judgment is *prima facie* evidence of the default. But, where the guarantor is liable without suit against the principal, the judgment against him is regarded as strictly matter *inter alios.* The judgment of eviction, in order to show a breach of the covenants of warranty, is a case of the first class. The judgment of eviction is a necessary step in making out the liability of the warrantor; that is, the *casus foederis.* So, too, generally, I apprehend, when anyone undertakes to indemnify against the consequences of a suit, or that a suit brought shall be effectual, the judgment in either case, being the *casus foederis,* is *prima facie* evidence of the liability. And, on the other hand, where the suit may, in the first instance, be brought directly against the guarantor, the judgment against the principal, without notice to the guarantor, is not evidence; and so, too, if the guarantor have notice of suit against the principal, he is not obliged to concern himself in its defense, but may await a suit against himself and then insist upon the right to contest the whole ground.

The defendant in the case at bar was not a party to the contract, nor could he have insisted on being made a party to the action between Evans and McConnell thereon. The latter might have brought suit against both principal and surety on the bond, but he chose, as was his right, to base his action on the contract alone. Even if these might have been regarded, for some purposes, as one instrument, the appellant elected to treat them as distinct and separate by basing his suit against Evans solely on the contract, and that against Poor on the bond. The surety may require the principal to defend, for this is his duty; but the surety owes no such duty to the principal, and is under no obligation to defend him. Poor was not a party to the action on the contract, for he could neither appear and control the suit nor appeal from the decree. Nor was he privy to that action. Privity, says Greenleaf, denotes mutual or successive relationship to the same right of property. Privity in law involves the right of representation, and certainly the principal, in an action against himself alone, may not represent the surety. As was said in *Giltinan* v. *Strong,* 64 Pa. 244: "The privity of the surety with his principal is in the contract alone, and not in the action." For the acts or omissions of the principal to which the surety pledges himself in his contract he is bound, and it is only in this respect the principal represents the surety. This is the criterion of the competency of the principal's declarations and admissions. Where these form a part of the acts or omissions of the principal for which the surety is bound, they constitute portions of the *res gestae,* and may be evidence against the surety. But beyond this line clearly the surety cannot be affected by the acts or admissions of his principal, for he is not represented by him. True, Poor was the attorney for Evans in the suit on the contract, contested it with zeal and persistency, and was charged with notice thereof. See *Evans* v. *McConnell,* 99 Iowa, 332, 63 N. W. 570, 68 N. W. 790. But as surety he could make no defense to the action on the contract. His client might have revoked his authority at any moment. He could have gone further, and dismissed the action, or, rather, withdrawn his defense to the cross petition, without consulting the surety. See *Jackson* v. *Griswold,* 4 Hill, 528. For the reasons stated we are of opinion the district court did not err in holding the defendant not bound by the findings against his principal in the former action.

2. The appellant insists the contract permitted changes, and this is true. But the manner of making them is specifically pointed out. "The value of such changes or alterations, without additions or deductions, will be estimated according to the rate at which the work has been taken, and the amount added to or deducted from the amount hereinafter specified." This precluded the parties from entering into arrangements for additional work, or that of a different character, without compensation corresponding relatively to the contract price. If this were not so, an entirely different building from that stipulated might have been erected at the surety's cost. Thus, the alleged change in the broken ashlar work alone occasioned an additional expense of $1,600 or more,—more than the balance claimed. While the plaintiff had the option of making alterations, he might not do so without paying therefor at the rate fixed by the contract.

3. The evidence was in conflict on every issue submitted to the jury, and sufficient to support the verdict. The instructions in the respects criticised were clear and accurate, and included those requested, in so far as correctly stating the law.

Affirmed.

MORRISON *et al. vs.* ARONS *et al.* (1896).

65 Minn. 321; 68 N. W. 33.

Action in the district court for Ramsey county. The case was tried before Kelly, J., who ordered judgment against defendant Arons for $801.43, and against defendants Williams and Hall for $559.50, with interest. From an order denying a motion for a new trial defendants Williams and Hall appealed. Reversed.

Fred N. Dickson, for appellants.

Frank A. Hutson and *Warner, Richardson & Lawrence,* for respondents.

COLLINS, J. Plaintiffs entered into business as co-partners, and employed defendant Arons as general manager, salesman, and collector. According to the written contract, the employment was to continue as long as mutually agreeable. Arons was to receive as compensation for his services a sum equal to one-half the net profits of the business, and these profits were to be ascertained as follows:

> "During the existence of the employment of said party of the second part, once each month, commencing with December 1, 1892, a just and true inventory of the assets and liabilities of said firm shall be taken, and all accounts which are considered bad shall be charged to profit and loss, and from the residue of the accounts due said firm shall be deducted five per cent. of the aggregate amount thereof as a reserve to cover bad debts, and the excess of the assets over the liabilities and the capital stock of said firm shall be determined and agreed upon as the net profits of said business, and a sum equal to one-half of such excess shall then and there be credited to said party of the second part as and for his compensation, and be considered an expense of said business. That when the relation between said firm and said party of the second part is extinguished, then the actual amount of profit or loss, as the case may be, of the business of said firm, shall be determined, and, if there has been a net profit, a sum equal to one-half thereof shall be allowed said party of the second part, and any errors in estimating the net profits at the previous stated periods shall then and there be rectified, and, if said party of the second part shall have withdrawn more money from said firm than he is entitled to, he shall then and there forthwith repay the same; and, if there is any amount due him on account of his compensation, it shall then and there forthwith be paid him."

Arons, as principal, and defendants Williams and Hall, as sureties, entered into a bond, in which plaintiffs were obligees, which, after reciting that Arons was about to enter plaintiffs' employ as general manager, salesman, and collector, provided, and was conditioned, that:

> "If the said Charles T. Arons shall faithfully and honestly perform all the duties of his said employment, and shall keep just and true accounts of all moneys received and expended and all property bought and sold for or on account of said firm by him or under his direction, and shall faithfully and fully, and as often as required, account for and pay over to said firm any and all moneys belonging thereto collected or received by him, or which in any manner come into his hands in the course of his employment by said firm; and shall forthwith and on demand repay to said firm any and all moneys he shall have withdrawn therefrom for his own use in excess of the compensation due him for his services under the terms of his agreement with said firm in that behalf (whether such moneys shall have been so withdrawn with the consent of said firm or otherwise), as often as it shall be determined that such overdraft has been made, then the above obligation to be void; otherwise to remain in full force and virtue."

This action was brought to recover an amount of money said to be due on the bond, and the trial was by the court. No evidence was introduced tending to show any other settlement or accounting than that had when Arons' term of employment ended. In fact plaintiffs admitted that they never ascertained, and could not, at the time of the trial, ascertain, what the respective monthly profits of the business had been. At the conclusion of the plaintiffs' case and again at the conclusion of the entire case, the defendant sureties moved the court to dismiss the same as to them upon the ground that, as it affirmatively appeared from the evidence and admissions that no monthly settlements or accounting had been had as provided for in the contract of employment, the sureties upon the bond had been released from liability. These motions were denied, and the court made its findings of fact and conclusions of law ordering judgment in plaintiffs' favor.

The court found the allegation in the complaint that no settlement or accounting was had between the parties until after Arons' employment ceased, to be true. We agree with the court below in its construction of the contract, but we cannot concur in its holding that the sureties were not discharged by the failure and omission to have monthly accountings and settlements between Arons and plaintiffs. The former was to have advanced to him $100 each month for personal expenses and on account of his compensation under an agreement that, if this amount, with other sums of money which came into his possession, exceeded one-half of the net profits of the business, the excess should be promptly refunded. What the profits were, and the sum due to plaintiffs, if anything, were to be provisionally ascertained each month; and, had this been done, it is quite certain that plaintiffs would have discovered before the expiration of 13 months that the business was not profitable, while Arons would have learned that he was far from earning a living out of it. The natural result would have been for both parties to terminate their contract relation, and avoid further loss. It is evident that there would be much less hesitation on the part of a person called upon to become a surety upon a bond given for the faithful performance of a contract with such conditions than if the real situation was not to be ascertained for months. The condition in the employment contract whereby monthly accountings and settlements were agreed upon was an exceedingly beneficial one for all concerned. It was an essential feature of the contract whereby Arons agreed to conduct plaintiffs' business enterprise for an indefinite period of time, his compensation to be determined by the net profits. The contract of suretyship was departed from and varied when this provision was wholly disregarded, and the case is brought directly within the rule that, if an essential condition of such a contract is not complied with, a surety is not bound. A new trial must be had.

Order reversed.

Followed in *Fidelity Mutual Life Ass'n* v. *Dewey* (1901), 83 Minn. 389; 86 N. W. 423; 54 L. R. A. 945.

AETNA INS. CO. *vs.* FOWLER *et al* (1896).

108 Mich. 557, 66 N. W. 470.

Error to Saginaw; WILBER, J. Submitted January 15, 1896. Decided March 11, 1896.

ASSUMPSIT by the Aetna Insurance Company against Charles G. Fowler, Chester Brown, and Gustavus H. Fuerbringer upon an indemnity bond. From a judgment for plaintiff on verdict directed by the court, defendants Brown and Fuerbringer bring error. Reversed.

Wood & Joslyn, for appellants.

Weadock & Purcell, for appellee.

MONTGOMERY, J. Action on the bond of an insurance agent. Defendant Fowler was employed as the agent of the company at Saginaw, and in December, 1883, executed a bond, with his co-defendants as sureties, the conditions being as follows:

> "The condition of this obligation is such that whereas the above-named Charles G. Fowler has been appointed agent of the Aetna Insurance Company in Saginaw, Saginaw county, State of Michigan, who will receive as such agent sums of money for premiums, payments of losses, salvages, collections, or otherwise, for goods, chattels, or other property of the said insurance company, and is to keep true and correct accounts of the same, pay over such money correctly, and make regular reports of the business transacted by him, to the said Aetna Insurance Company, and in every way faithfully perform the duties as agent, in compliance with the instructions of the company through its proper officers, and at the end of the agency, by any cause whatever, shall deliver up to the authorized agent of said company all its money, books, and property due from or in possession. Now, then, if the aforesaid agent shall faithfully perform all and singular the duties of the agent of the Aetna Insurance Company, then this obligation shall be null and void."

The instructions to agents were to send statements of all business transacted during the previous month as early as the 12th of each month. The testimony shows that for three months prior to September 1, 1893, the defendant Fowler failed to send remittances, and it was shown that it was not the custom of the company to insist upon absolute promptness in remittance, but that after three months' delay it was the custom of the company to discharge the delinquent agent. The testimony further shows that in the latter part of July or the first of August, 1893, the special agent of the company, a Mr. Neal, visited Saginaw, and, as he described it, found the agency in a "rocky condition;" and, while counsel were disagreed as to the effect of his testimony, we think it is at least open to the construction that he then learned that Fowler had misappropriated the funds of the company, and invested them in realty. The circuit judge directed a verdict for the plaintiff. The recovery included a shortage in accounts before August 1st, and a shortage of $344.16 arising from the August business.

Two contentions are made: *First*, that it was the duty of the company to notify the sureties of any delay in the remittance, at once, and that the continuance of the agent after failure to remit in accordance with the instructions of the company to agents released the sureties as to future transactions; and, *second*, that the company, on the discovery of the misappropriation of funds, August 1st, was bound to discharge the agent, or, at least, the sureties were not bound to respond for his future defalcations, unless, after being informed of his previous acts of dishonesty, they consented to his retention.

We think that the court below correctly ruled that the mere fact that the company had knowledge that the agent had failed to remit did not impose upon it the duty to notify the sureties or discharge the agent. *Watertown Fire Ins. Co.* v. *Simmons*, 131 Mass. 85 (41 Am. Rep. 196); *Atlantic, etc., Tel. Co.* v. *Barnes*, 64 N. Y. 385 (21 Am. Rep. 621). The duty which the company owed to the sureties was not a duty of active vigilance, to ascertain whether the agent had been guilty of fraud (the sureties' undertaking was a guaranty of his fidelity), but what was due from the employer was good faith to the sureties. Just as it would have been a fraud to withhold knowledge of previous dishonesty of the agent presumably not known to the sureties, but possessed by the company, so it would be a breach of good faith for the company to continue the agent in a place of trust after discovering his dishonesty or defalcation, which is presumptively and in fact unknown to the sureties, and without notifying the sureties of the facts, and giving them an opportunity to elect as to whether they will continue the risk. This is the doctrine of the leading case of *Phillips* v. *Foxall*, L. R. 7 Q. B. 666. The cases of *Watertown Fire Ins. Co.* v. *Simmons* and *Atlantic, etc., Tel. Co.* v. *Barnes* are not inconsistent with this. The substance of the holding in each of these cases is that the mere failure of remittance does not necessarily amount to notice of dishonesty on his part, and that applies to the present case as regards the charges occurring before August. There is no evidence that prior to August the company had actual notice that Fowler had converted any of the funds to his own use, or was more than negligent in remitting or collecting the premiums; but as to the transactions in August the case is different. Under section 9191, 2 How. Stat., it is made an offense for an insurance agent to receive and invest money of the company without its assent; and, as we before stated, we think there was testimony tending to show notice to the company about the 1st of August that Fowler had invested the funds of the company in realty. If the company, through its special agent, then knew this fact, it cannot be said not to have had notice of the dishonesty of the agent; and, if it had such notice, it was the duty of the company not to longer trust its funds with the agent until the sureties had consented, with knowledge of the facts, to be held responsible for the acts of a dishonest agent. See, further, 2 Brandt, Sur. § 423; *Connecticut Mut. Life Ins. Co.* v. *Scott,* 81 Ky. 540.

Judgment reversed, and a new trial ordered.

The other Justices concurred.

BUTLER *vs.* UNITED STATES (1874).

21 Wall. (88 U. S.) 272; L. Edn. Bk. 22, 614.

In error to the Circuit Court of the United States for the Eastern District of Tennessee.

This was an action of debt in the court below, on a joint and several internal revenue bond executed by Benjamin B. Emery, as principal, and by Roderick R. Butler, Ethan A. Sawyer and William Choppin as sureties, in the sum of $15,000. Butler defended on the ground that, at the time he signed and affixed his seal to the bond, it was a mere printed form, with blank spaces for the names, dates and amounts to be inserted therein; and that the blanks were not filled, and there was no signature thereto, except Emery's; that Emery promised, if Butler would sign the bond, he would fill up the blanks with the sum of $4,000, and would procure two additional securities in the District of Columbia, each of whom was to be worth $5,000; and that the bond was delivered to Emery with the understanding and agreement that the bond otherwise was not to be binding on the defendant, but was to be returned to him; that the defendant never after ratified or acknowledged the validity of the bond; that the other sureties did not reside in the District of Columbia, and were wholly insolvent and worthless; and that Emery obtained the signature by false and fraudulent representations. The circuit judge ruled that this was no defense to the action; a verdict was taken for the plaintiffs, and the defendant excepted and brought this writ of error.

Messrs. S. Shellabarger, H. Maynard and *J. M. Wilson,* for plaintiff in error.

Mr. C. H. Hill, Asst. Atty.-Gen., for defendant in error.

Mr. Chief Justice *WAITE* delivered the opinion of the court:

We cannot distinguish this case in principle from *Dair* v. *U. S.*, 16 Wall,, 1 (83 U. S., XXI., 491). The printed form, with its blank spaces, was signed by Butler and delivered to Emery, with authority to fill the blanks and perfect the instrument, as a bond to secure his faithful service in the office of Collector of Internal Revenue. He was also authorized to present it, when perfected, to the proper officer of the Government for approval and acceptance. If accepted, it was expected that he would at once be permitted to enter upon the performance of the duties of the office to which it referred.

It is true that, according to the plea, this authority was accompanied by certain private understandings between the parties, intended to limit its operations, but it was apparently unqualified. Every blank space in the form was open. To all appearances, any sum that should be required by the Government might be designated as the penalty, and the names of any persons signing as co-sureties might be inserted in the space left for that purpose. It was easy to have limited this authority by filling the blanks, and the filling of any one was a limitation to that extent. By inserting, in the appropriate places, the amount of the penalty or the names of the sureties or their residences, Butler could have taken away from Emery the power to bind him otherwise than as thus specified. This, however, he could not do. Instead, he relied upon the good faith of Emery, and clothed him with apparent power to fill all the blanks in the paper signed, in such appropriate manner as might be necessary to convert it into a bond that would be accepted by the Government as security for the performance of his contemplated official duties. It is not pretended that the acts of Emery are beyond the scope of his apparent authority. The bond was accepted in the belief that it had been properly executed. There is no claim that the officer who accepted it had any notice of the private agreements. He acted in good faith, and the question now is, which of two innocent parties shall suffer. The doctrine of Dair's case is that it must be Butler, because he confided in Emery and the Government did not. He is, in law and equity, estopped by his acts from claiming, as against the Government, the benefit of his private instructions to his agent.

The judgment is affirmed.

STONER *vs.* MILLIKIN, *et al.* (1877).

85 Ill. 218.

Mr. Harvey Pasco, for the appellant.

Mr. A. B. Bunn, for the appellees.

MR. CHIEF JUSTICE SHELDON delivered the opinion of the Court:

At the February term, 1874, of the county court of Macon county, a judgment was entered by confession, in favor of Millikin & Co., against Thomas Lee, John Lee and Andrew J. Stoner, for $453.33, upon a promissory note with a warrant of attorney attached, purporting to be executed by the three latter, dated the 24th day of June, 1873, payable ninety days after date to H Crea, and assigned by him without recourse.

An execution, issued upon the judgment, was levied upon personal property of John Lee, sufficient in value to satisfy it. Afterward, by direction of Millikin & Co., the sheriff released the property of John Lee from the levy, and levied the execution upon certain real estate of Stoner, and the bill in this case was filed by Stoner to enjoin the sale of his property under the execution.

The court below, upon final hearing on proof, dismissed the bill, and the complainant appealed.

The chief ground relied upon in support of the bill is, that the signature of the name of John Lee to the note is a forgery. The note is a joint and several one, the signature of Stoner being last upon the note. He testifies that Thomas Lee applied to him to sign the note as his security; that he refused to do so unless Lee would first get his brother, John Lee, to sign the note; that Lee went away saying he would go and get John to sign it; that the next day he came back, saying that he had got John to sign it, and presented the note with the signature of John Lee appearing to it, and witness then signed it, supposing the signature of John Lee to be genuine, knowing him to be responsible, and had he not supposed the note to have been signed by John Lee, he would not have executed it. Thomas Lee had made the arrangement beforehand with Millikin & Co., to lend him the money. H. Crea, the payee of the note, was but nominally such, Millikin & Co., being the real payees, and on presentment of the note, with Crea's indorsement on it, by Thomas Lee to Millikin & Co., who were bankers, they discounted the note, paying the proceeds to Thomas Lee.

The bill alleges, the way John Lee's property came to be released was, that he made an affidavit that he never signed the note and that his signature to the same was a forgery, and that upon the making of such affidavit Millikin & Co. caused his property to be released from the levy. Although it is this forgery which is mainly relied on for the discharge of Stoner, it is yet objected, as against the release of John Lee's property and the levy on Stoner's, that there is no proof of the forgery, more than this affidavit. Upon an examination of the bill, we take that, as alleging the fact of the forgery; and the answer of Millikin & Co. and the sheriff admits the same. By the pleadings, the forgery must be considered an admitted fact in the case. The confession of judgment, then, against John Lee, was unauthorized, and a nullity, and his property was rightly released from the levy under the execution.

Why should this forgery operate in discharge of Stoner, and entitle him to have his property exempted from sale on the execution?

It may have been a wrong toward him, and have caused him to incur a greater extent of liability than he expected; and the supposed obtaining of the execution of the note by John Lee may have been the sole condition upon which he signed his name to the note. Yet, on satisfactory evidence to himself, in that respect, he did place his name unconditionally to the note as a maker thereof, and left it with Thomas Lee to deliver to Millikin & Co., knowing that on the faith of his, Stoner's, promise to repay it, they would part with their money to Thomas Lee. There is no just reason why this promise to Millikin & Co. should not be kept.

Whatever of wrong there was to Stoner, was perpetrated by his co-maker, Thomas Lee. Millikin & Co. were wholly innocent in the matter; they had no notice of anything which had been transpiring among the makers of the note, as between themselves. Nor was it incumbent upon Millikin & Co. to exercise care over the interest of the surety in the note, look to the inducement which led him to become such, and see that it should not fail. They had but to watch over their own interest, and see that the security offered was a sufficient protection for them. For the lack of the vigilance they failed to exercise in this respect, they suffer the full consequence in the loss of the security of the name of John Lee. Whatever of fraud and deception the co-makers of the note practiced toward one another, was their own sole concern, and the consequence, so far as may affect them in their relation to each other, should be borne by themselves alone. There is no justice in requiring Millikin & Co. to assume the risk of such conduct, and no sound principle upon which they should be made to suffer loss because of it, not being privy thereto.

York County M. F. Insurance Co. v. *Brooks,* 51 Me. 506, and *Selser* v. *Brock,* 3 Ohio St. 302, are direct authorities to the point that such a forgery of the name of a prior surety will not discharge a subsequent surety. See *Young et al.* v. *Ward,* 21 Ill. 223.

We regard the language of LORD HOLT, in *Hern* v. *Nichols,* 1 Salk. 289, as applicable, that "Seeing that somebody must be a loser by this deceit, it is more reason that he that employs and puts trust and confidence in the deceiver should be a loser, than a stranger."

The case of *Seely* v. *The People,* 27 Ill. 173, is departed from so far as it conflicts with the principle of the present decision.

We are satisfied with the decree, and it is affirmed.

Decree affirmed.

DEERING *vs.* MOORE (1893).

86 Me. 181; 29 Atl. 988.

Geo. C. Hopkins, for plaintiff.

C. P. Mattocks and *L. Burton,* for defendants.

HASKELL, J. Debt by an obligee against a surety upon two bonds, given by a collector of taxes for the years 1884 and 1885, respectively. The last bond was not signed by the principal. Each surety bound himself severally, and not jointly, in the sum of $5,000. The obligee received from two sureties a sum of money, "in full discharge from liability upon each bond." Two questions are presented:

I. Did the failure of the principal to sign the last bond render it void? We think not. The bond was conditioned that the principal should faithfully perform official duty. This he was bound by law to do, just as effectually as if he had covenanted to do it by signing the bond. The engagement of the surety, therefore, rested upon the legal obligation of the principal already incurred. It is not like the cases, often referred to, where no obligation attaches to the principal, outside of the bond itself. In those cases, the principal not being bound, it would be unjust to hold the surety. Nor is it like the case of bail, where the sureties have peculiar rights flowing from the stipulation agreed to by the principal. The bond must be held good at common law. *Howard* v. *Brown*, 21 Maine, 385; *Scarborough* v. *Parker*, 53 Maine, 252; *Goodyear Co.* v. *Bacon*, 148 Mass. 542.

II. Did the discharge of two sureties release the defendant, another surety? No. The defendant was one of six sureties, who bound themselves severally and not jointly, each in the sum of $5,000. Their relations to each other are precisely the same as if each one had executed a separate bond. They are neither necessarily joint debtors, nor joint sureties. Had the principal executed the bond, he would have bound himself in the sum of $30,000. The sureties, instead of standing in jointly for that amount, divided it equally among them, and each one became severally bound for his aliquot share. They are sureties for the principal, and may or may not be called upon to bear a common burden, as circumstances may require. If they are, (that is, if the whole liability be less than the aggregate amount assumed by all of them, it becomes a common burden, not by reason of any contract or engagement to indemnify each other, but on the principle of equity, that a common burden shall be equally borne by all,) they become co-sureties, and stand in relation to each other as joint debtors, and are bound to contribute to each other, so that they shall all fare alike. In cases of this sort, of course, none can be charged beyond the amount that he has stipulated for. *Warner* v. *Morrison*, 3 Allen, 567. It follows, therefore, that the release of one would work the release of all. That is based upon the presumption of payment, the seal being conclusive evidence of complete and ample consideration. To work the discharge of a debtor, the agreement must be made upon sufficient consideration, and that pays the debt. At common law, the part payment of a debt is not sufficient consideration for its discharge. *Bailey* v. *Day*, 26 Maine, 88; *Potter* v. *Green*, 6 Allen, 442. If the discharge be by a sealed instrument, it is of no consequence what the actual consideration may be, for the seal is conclusive evidence of sufficient consideration. By the statute of this State, passed in 1851, c. 213, R. S., c. 82, § 45, the settlement of a demand upon the receipt of money or other valuable consideration, however small, will bar an action upon it. It should be observed that the demand must be settled, in order to effectuate that result. The discharge of a debtor from liability upon a demand that is to remain outstanding will not so operate. This distinction applies where one or two joint debtors is discharged upon the consideration of part payment, leaving the demand outstanding against the other. Such discharge will not bar an action against both; nor can it be pleaded by the other in an action against him, if the liability be several. *Bank* v. *Marshall*, 73 Maine, 79; *Drinkwater* v. *Jordan*, 46 Maine, 432; *McAllester* v. *Sprague*, 34 Maine, 296.

In the case at bar, the attempted discharge of some of the sureties is not pretended to have been by a sealed instrument. Had it been, it would have worked a discharge of all the sureties, for they stand in the relation to each other of joint debtors, being co-sureties for the payment of the same debt. Nor does it pretend to have discharged the whole debt, as provided for by statute. It simply presumes to discharge some sureties from a liability or debt that was to remain outstanding, and, therefore, not being upon sufficient consideration that would have paid the debt, or so much of it as they had engaged to pay by their covenant, nor evidenced by a sealed instrument, it was ineffectual to discharge any one.

The result is, damages upon the last bond should be assessed in a sum equal to the existing default of the principal, with interest from the time it accrued, leaving the defendant to such claims for contribution as shall prove just.

Defendant defaulted. Damages to be assessed below.

DODD *vs.* WINN (1858).

27 MO. 501.

This was an action in favor of Levi Dodd against Isham O. Winn on a promissory note executed by David C. Glascock, M. McDonald, R. F. Richmond, Minor J. Winn, James G. Caldwell and said Isham O. Winn. The jury found the following special verdict: "We, the jury, find a special verdict as follows: On the 6th day of April, 1849, the plaintiff Dodd sued Minor J. Winn, on the same note now sued on, before the recorder of the city of

Hannibal, the said Minor being one of the obligors in the note. Said Dodd recovered a judgment before said recorder against said Minor on the 6th day of April, 1850; and an execution was issued by said recorder on said judgment on the 11th day of April, 1850, and placed in the hands of the marshal of said city, and by him levied on a house in said city as the property of Minor J. Winn; that said marshal advertised said house for sale under said execution, but did not sell the house, being ordered by the plaintiff's counsel to tear down the advertisements and return the execution "no property found;" which he did; and no execution has since issued on said judgment by the recorder. The jury further find as follows, that when the marshal levied on the house as aforesaid, a part of said house was owned by said Minor J. Winn, which part so owed by him was worth the sum of $137.50. Said house was standing on a piece of ground owned by Jeremiah Strode, who had leased it to said Minor J. Winn, with the privilege of taking off when he pleased any house he might erect thereon. Minor J. Winn had built the house in question on said lot, but had sold a part of it before the execution was levied as before stated. The jury further find that David O. Glascock was the principal in the note sued on, and that Minor J. Winn and Isham O. Winn were each securities for said Glascock."

The court rendered judgment on this verdict in favor of plaintiff for eighty dollars debt (four-fifths of the amount of the original note sued on), and assessed the damages for the detention thereof at seventy-six dollars.

Lamb & Lakenan, for plaintiff in error.

Porter & Harrison, for defendant in error.

Richardson, Judge, delivered the opinion of the court.

The law is well settled that a valid agreement between the creditor and the principal debtor to extend the time of payment, or any improper interference by the creditor with the process of law after the commencement of a suit, by which the surety may be injured or subjected to greater risk, or be delayed in the right on payment of the debt to proceed against the principal, if made or done without the assent of the surety, will discharge him from his liability; (24 Mo. 333; 26 Mo. 243;) and the relation of principal and surety or of co-sureties is not extinguished by judgment. *Rice* v. *Morton,* 19 Mo. 263. A release of the principal will discharge the surety, but one surety may be discharged, without prejudice to an action against the others, to the extent that they would be liable in a suit for contribution between themselves. *Routon* v. *Lacy*, 17 Mo. 399. The creditor can not, by discharging one, increase the liability of the other; and he will not be allowed, by discharging one, to impose on the other a greater proportion of a common burden than in equity he ought to bear. At law, if there are several sureties and one is insolvent and another pays the whole debt, he can only recover against the solvent sureties their *pro rata* part as if all of them were solvent; but the rule in equity is more just and reasonable, and the insolvent's share is apportioned among those who are solvent. 1 Story Eq. § 498. The eighth section of our statute concerning securities provides that one surety at the suit of another shall not be liable to pay more than his due proportion of the original demand, but what is his due proportion will vary according to the circumstances. Thus, if there are three sureties, and all of them are solvent, and one pays the debt, each of the others will be liable to him for one-third of the amount only; but if one of them is insolvent, the other will be liable for one-half.

In this case it seems that Glascock was the principal debtor, and that the other five parties to the note were sureties. Now if all the sureties were solvent, and the defendant paid the debt, he could only require M. J. Winn to contribute one-fifth part of it, and therefore could only ask to have one-fifth abated, and could only complain of the conduct of the plaintiff in releasing the levy of the execution to that extent. But if the other sureties are insolvent, M. J. Winn would be bound to contribute to the defendant one-half instead of one-fifth of the debt; in which case, if the plaintiff had released M. J. Winn, he could only demand of the defendant the other moiety; and, on principle, the same result must follow if he could have made half the debt but for his improper interference with the execution. These questions can not be determined from the meagre statement of facts in the special verdict. It does not appear whether the other sureties were solvent or not.

The statute authorizes this court to remand a cause when the facts in a special verdict are insufficiently found; (2 R. C. 1855, p. 1301, § 35;) and the judgment then will be reversed and the cause remanded; Judge Napton concurring. Judge Scott not sitting.

PRIOR *vs.* WILLIAMS (1866.)

3 Abb. App. 624.

Horace Prior and James Prior, as executors of Henry Prior, deceased, brought an action, in the New York superior court, against Gibson T Williams, Harriet H. Chamberlin and William B. Chamberlin, in which they asked, as subsequent mortgagees, to be allowed to redeem certain premises in the city of Buffalo, owned by Harriet H. Chamberlin, from the lien of a mortgage held by Williams. They also asked that the mortgage under which they claimed might be reformed.

The facts of the case were, that William B. Chamberlin, son of Harriet Chamberlin, being a member of the firm of Prior, Holcomb & Co, doing business in New York, had induced his mother to indorse certain notes in blank, upon the agreement that they were to be signed by the firm and used in their business. One of these notes, for fifteen hundred dollars, at three months, he (William H. Chamberlin) signed with his own individual name, and negotiated to Henry Prior, brother of the Horace Prior of his firm. On the note falling due, Henry Prior agreed to extend the time for payment to one year, provided he were secured by a mortgage on Mrs Chamberlin's property in Buffalo. A mortgage was accordingly made by Mrs. Chamberlin to meet the wishes of Henry Prior. By a mistake, however, the mortgage was made to Horace Prior, and the note, to secure the payment of which the mortgage was made, was described as being payable "*one year after the date thereof*," instead of three months after date. The false description of the note was not noticed, and the mortgage was assigned by Horace Prior to Henry Prior, and held by him up to the time of his death, and after that by his executors, until the property on which it was given being about to be sold under the foreclosure of a prior mortgage, they brought this action to be allowed to redeem, and to have their mortgage reformed by having the words "one year after date thereof," in the description of the note, stricken out, and the words "three months after date thereof" inserted.

The referee reported in favor of plaintiffs, and the judgment thereon was affirmed by the court at general term. Defendants appealed to this court.

J. D. H. Chamberlin, for defendants, appellants.

William Dorsheimer, for plaintiffs, respondents.

PECKHAM, *J.* The only point made by the appellants requiring examination is, whether this mistake in this mortgage can be corrected by the court, as the mortgagor was a mere surety.

The appellant does not urge that the mortgage is already sufficient, as perhaps she might. See *Jackson* v. *Bowen,* 7 Cow. 13, and cases cited.

Counsel referred to the remarks of the chancellor of *Ontario Bank* v. *Mumford,* 2 Barb. 596, at 613. It is true the chancellor used language which the case, as finally disposed of, did not require. He remarked that a bond could not be reformed as against a surety, "even though it was his intention to bind himself at the time the bond was executed. For the statute of frauds requires an agreement in writing to bind a surety, and if the surety has not already executed a valid agreement to answer for the debt or default of his principal, this court cannot compel him to execute such an agreement, upon the ground that he has attempted to do so, but has failed of accomplishing his object by mistake or inadvertence."

With deference, I do not think it an answer to a bill for the reformation of an instrument, that it would have been invalid if not in writing, and that, therefore, it cannot be reformed. Upon such a doctrine, a deed of land or a mortgage could not be reformed even against a principal, because either is invalid if not in writing.

A party sells a farm of one hundred acres, but by a mistake of the scrivener the deed conveys but fifty. The mistake is not discovered until after the deed is accepted and the money paid by the grantee. This doctrine would prevent the reformation of that deed. The right to grant relief in such a case will scarcely be denied. But the proof of the case must be entirely clear and satisfactory.

In *Phelps* v. *Garrow,* 8 Paige, 322, where one Smith had purchased goods of the plaintiffs under an agreement to give Garrow's indorsement on their draft on Smith therefor, payable to Garrow's order, the draft was made and indorsed accordingly. Garrow took up the draft and then brought his action against the plaintiffs as drawers. They then filed their bill against Garrow to restrain the further prosecution of that suit, not to reform the draft. The court dismissed the complaint, holding that Garrow was not liable either at law or in equity, though he admitted that he intended to become liable by indorsing the draft.

The courts now would hold him liable under such facts at law.

There, however, was no mistake of fact, and courts have frequently recognized the force of a distinction between a mutual mistake of law and of fact, although, as a general rule, there is little ground for the distinction. In most cases there is as good ground for relief when both parties have acted under a mistake of the law, as there is where the mistake is confined to the fact.

The mistake found here is one of fact. The other cases cited by the appellants of *Walsh* v. *Bailie,* 10 Johns, 180; *Dobbin* v. *Bradley,* 17 Wend. 422; *Wing v. Terry,* 5 Hill, 160; *Birckhead* v. *Brown,* Id. 634, only illustrate the extreme strictness with which contracts of sureties are construed, and that they will not be extended beyond their letter. They have no pertinence to the question.

The power of a court of equity to reform an instrument as against a surety is fully recognized and declared in Story Eq. vol. 1, § 164.

In *Wiser* v. *Blachley,* 1 Johns. Ch. 607, where a bond given by a surety for the guardian of an infant was taken by the surrogate in the name of the people, instead of the infant, the court corrected the mistake,—the chancellor remarking that he had no difficulty in saying that it was within the ordinary jurisdiction of that court to correct such a mistake by holding the party according to his original intentions. That was in harmony with good morals as well as with sound law.

So in *Weaver* v. *Shyrock*, 6 Serg. & R. 262, 964. TILGHMAN, Ch. J., affirmed the same doctrine as against a surety.

Many cases may be conceived where the grossest injustice would result if courts had no power to correct mistakes as against sureties. Mistakes are as likely to occur with them as with others, and there is no sound principle that prevents their being compelled to act justly and honestly. Where the surety is aware of and assents to the purpose to which his obligation is to be applied, and it is so used, though without consideration except that advanced to the principal, equity will reform any mistake of fact so that the obligation shall fulfill its purpose.

In the case at bar, from the facts disclosed, the testator would probably have been able to collect his note at maturity had he not relied upon the mortgage. Upon the mortgage nine months' longer time was procured with the knowledge of the mortgagor. It was given by her for that precise purpose, and so accepted by the mortgagee. If by mistake in the description of the note or by any other mistake therein misleading the mortgagee, it has failed to execute its purpose, the courts have the power, and we think it their duty to reform the instrument so as to carry out the intent of the parties.

The judgment of the court below should be affirmed.

NOTE—The concurring opinion of WRIGHT, J., is omitted.

EMMERT *vs.* THOMPSON (1892).

49 Minn. 386; 52 N. W. 31.

Appeal from district court, Nobles county; BROWN, Judge.

Action by Joseph Emmert against Peter Thompson and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Daniel Rohrer, for appellant.

Warner, Richardson & Lawrence and *G. W. Wilson,* for respondents.

COLLINS, J. When the loan of money was made by defendant Cornwell to defendant Marr, to secure which, as agreed upon, the latter mortgaged his entire farm, consisting of 240 acres, it was for the stipulated purpose of relieving one tract (160 acres) from the trust deed held by Ormsby, the balance (80 acres) from the Hayes mortgage, and the entire farm from delinquent taxes. The trust deed, the mortgage last referred to, and the taxes were represented to be, and in fact were, first liens upon the premises; and Cornwell believed, and it was implied from what Marr stated when applying for the loan—there were no other incumbrances, and that, with these paid off and discharged, his mortgage would take their place, and become the first and only charge upon the property. The taxes and the amounts due on the incumbrances, aggregating $1,434.82, were paid out of the proceeds of the loan, in accordance with the agreement under which it was made. Proper releases and discharges were procured and at once recorded, in the mistaken belief on the part of Cornwell, and the agents who transacted the business, that there was no other or prior charge upon the premises. For some time thereafter they remained in ignorance of the fact that plaintiff's mortgage was in existence and of record when the one in question was executed, and by their acts had, of record, become the senior lien. As Marr was and is insolvent, and plaintiff's mortgage, with costs and disbursements of foreclosure, now exceeds in amount the value of the farm as found by the trial court, the seriousness of the situation is quite apparent. The court below subordinated the plaintiff's claim to that of defendant Cornwell, to the extent of the payments made for taxes, and to satisfy and extinguish the incumbrances, reinstating the liens, in effect; and its right and power so to do is the principal question now before us.

It has been well said that the doctrine of subrogation has been steadily growing and expanding in importance, and becoming more general in its application to various subjects and classes of persons. It is not founded upon contract, but is the creation of equity—is enforced solely for accomplishing the ends of substantial justice; and, being administered upon equitable principles, it is only when an applicant has an equity to invoke, and where innocent persons will not be injured, that a court can interfere. It is a mode which equity adopts to compel the ultimate payment of a debt by one who in justice and good conscience ought to pay for it, and is not dependent upon contract, privity, or strict suretyship. *Stevens* v. *Goodenough,* 26 Vt. 676; *Harnsberger* v. *Yancey*, 33 Grat. 527; *Smith* v. *Foran*, 43 Conn. 244. That in this way a court, under a great variety of circumstances, may relieve one who has acted under a justifiable or excusable mistake of fact, is readily conceded by appellant; but he invokes and seeks to have applied to respondents' case the general rule that the doctrine of subrogation will not be exercised in favor of a volunteer or a stranger who officiously intermeddles, such as a person who pays without any obligation so to do, or one who, without any interest to protect, liquidates the debt of another. There are a very respectable number of cases, several having been cited, in which relief has been refused under circumstances precisely like those now before us, where one who has loaned and used his money in good faith, and for the express purpose of relieving a debtor from a pressing obligation, and his real property from a specific lien for the amount of the same, under a genuine but excusable misapprehension as to the rank and position of security taken by him on the same property, has been treated and characterized as a volunteer, a stranger, and an officious intermeddler, and denied the rights of an equitable assignee. But of late years, with the development of the principles on which the doctrine is founded, the courts have been taking a broader and more commendable view of the situation of such a party, and at this time very little is left of the views expressed in the earlier cases. The better opinion now is that one who loans his money upon real estate security for the express purpose of taking up and discharging liens or incumbrances on the same property has thus paid the debt at the instance, request, and solicitation of the debtor, expecting and believing, in good faith, that his security will, of record, be substituted, in fact, in place of that which he discharges, is neither a volunteer, stranger, nor intermeddler, nor is the debt, lien, or incumbrance regarded as extinguished, if justice requires that it should be kept alive for the benefit of the person advancing the money, who thereby becomes the creditor. Of the many authorities on this, we cite *Association* v. *Thompson*, 32 N. J. Eq. 133; *Gans* v. *Thieme*, 93 N. Y. 225; *Sidener* v. *Pavey*, 77 Ind. 241; *McKenzie* v. *McKenzie*, 52 Vt. 271; *Cobb* v. *Dyer*, 69 Me. 494; *Levy* v. *Martin*, 48 Wis. 198, 4 N. W. Rep. 35; *Insurance Co.* v. *Aspinwall*, 48 Mich. 238, 12 N. W. Rep. 214; *Crippen* v. *Chappel*, 35 Kan. 495, 11 Pac. Rep. 453; 3 Pom. Eq. Jur. 1212; Harris. Subr. 811, 816; Dixon, Subr. 165.

It is contended by appellant that Cornwell must, under the circumstances, be declared culpably negligent when taking his security and discharging of record the Ormsby and Hayes liens; and, further, that, as the plaintiff's mortgage was then of record, he had notice of it, in contemplation of law, and could not have been misled or mistaken. Marr's application for a loan was for the avowed purpose of taking up and discharging the Ormsby and Hayes liens, and was well calculated to convey the impression that these were the only incumbrances. He intentionally or otherwise concealed the truth, omitting to state the existence of a junior incumbrance in a large amount, a knowledge of which would have ended at once all negotiations with Cornwell's agents. It was misleading, and the persons last named were not negligent because they, to some extent, relied upon and were misled by it. See *Newell* v. *Randall*, 32 Minn. 171, 19 N. W. Rep. 972. It is a common thing for courts of equity to relieve parties who have by mistake discharged mortgages upon the record, and to fully protect them from the consequences of their acts, when such relief will not result prejudicially to third or innocent persons. *Gerdine* v. *Menage*, 41 Minn. 417, 43 N. W. Rep. 91. Paraphrasing slightly a remark made in the opinion therein, it may be said that, considering this case as it stands between the appellant and respondent Cornwell, it is obvious that it would be most unjust and inequitable not to place the parties *in statu quo* with respect to the amounts paid out upon liens which were superior to that held by plaintiff, now being foreclosed. It is true that at the outset the mistake grew out of an error in the abstract books kept by Cornwell's agents; but later, when examining the records in the office of the register of deeds, the error was unnoticed and the mistake undiscovered. It was a mistake of fact, and, in our judgment, not of such a character as to bar the respondents' claim to equitable relief. That, in a proper case of mistake of fact, such relief may be afforded notwithstanding the intervening mortgage was of record when the error was committed, is well settled. *Geib* v. *Reynolds*, 35 Minn. 331, 28 N. W. Rep. 923. Cornwell misunderstood, and was justifiably ignorant of, the facts, and acted, through his agents, upon the assumption that he and they knew the true state of the title when the liens which his money had discharged were satisfied of record, and plaintiff's mortgage advanced to the position of the senior incumbrance, without a single act of his, and to the very great detriment of the person who had brought it about. The court was right in applying the principle of subrogation, or "equitable assignment," as it is frequently called.

Judgment was entered below, directing that the premises be sold, on foreclosure of plaintiff's mortgage, as one farm, and that, out of the net proceeds, there be first paid to respondent Cornwell the sums of money which he paid out as taxes, and to take up and satisfy the incumbrances before mentioned. The appellant's counsel distinctly approves that part of the judgment which requires a sale of the premises as an entirety, but makes the point, in case we affirm the action of the trial court on the main question, that the farm should have been sold subject to the subrogator's lien for a specific sum on the 160 and for another specific sum on the 80 acre tract, and thus there would have been avoided the possibility, which he now suggests, of having shifted over upon one of these tracts, to some extent, a burden which ought to wholly rest upon the other. It is evident from the record that the attention of the trial court was not called to this point, and hence the order that the sale be of the whole as one body of land. But we are unable to see how the result now suggested by counsel would have been avoided by the adoption of his plan without selling the tracts separately, keeping the funds derived from each distinct, and applying the same to the liquidation of the liens, so far as they might go. Counsel does not contend that the two tracts of land should have been sold separately, but, as before stated, indorses the judgment directing a sale *en masse*. He is concluded on this point by his position as to the manner of sale.

Judgment affirmed.

MORGAN *vs.* WORDELL (1901).

178 Mass. 350; 55 L. R. A. 33; 59 N. E. 1037.

APPEAL by plaintiff from a judgment of the Superior Court for Bristol county in favor of defendant upon an agreed statement of facts to determine the liability of defendant for a debt which he owed to the bankrupt. Judgment for defendant.

Wordell and Dillon were members of a partnership engaged in the dry goods business. The partnership was dissolved by an agreement under which Dillon purchased the interest of the copartners and agreed to pay the debts of the firm. Some of these debts he failed to pay. After the dissolution of the firm Wordell bought of Dillon goods for the purchase price of which this action was brought. After Dillon's Bankruptcy, defendant paid claims against the partnership to an amount exceeding that which he owed to Dillon. The amount so paid he sought to set off against the claim of the trustee for the purchase price of the goods.

Further facts appear in the opinion.

Messrs. *William M. Morgan* and *Henry T. Richardson,* for appellant.

Messrs. *John W. Cummings* and *Charles R. Cummings,* for appellee.

HOLMES, Ch. J., delivered the opinion of the court:

This is a suit by a trustee in bankruptcy against a debtor of the bankrupt. The debtor claims a set-off on the ground that since the bankruptcy he has paid debts due from a former partnership consisting of himself, the bankrupt, and one McGuire, from which debts the bankrupt had covenanted to save his partners harmless. It is objected that the covenant runs to the two other partners jointly, but it is sufficiently plain that there are several covenants to each. The more serious objection is that the principal debt paid is one which has been disallowed by final judgment when offered by the creditors, H. B. Claflin & Co., for proof against the estate, on the ground that they received a preference, and that a claim offered in the defendant's name in respect of the payment also has been disallowed.

As it was assumed on both sides that the provision in § 68*b* of the United States bankruptcy act concerning set-off is more than a rule of procedure, and governs in this court as well as in the courts of the United States, we shall make the same assumption for the purposes of this case, without argument. See *Hunt* v. *Holmes*, 16 Nat. Bankr. Reg. 101, 105, Fed. Cas. No. 6,890; *Partridge* v. *Phoenix Mut. L. Ins. Co.*, 15 Wall. 573, 580, 21 L. ed. 229, 239. We shall assume further, as a corollary, that if a set-off is to be maintained it must be brought within the words of the section referred to. Those words are: "A set-off or counter-claim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate." These words are universal in form, and we do not see how a set-off can be claimed in this case outside of them.

If, then, the defendant claims by virtue of the rights of a quasi surety (*Fisher* v. *Tifft*, 127 Mass. 313, 314) who has paid and therefore is subrogated to the claim of a joint creditor of himself and the debtor (§ 57*i*), the trouble is that he has to take the claim of Claflin & Co. as he finds it, and he finds it a claim which is not provable against the estate, because Claflin & Co. have received preferences which have not been surrendered. Section 57*g*. It seems hard that a matter between Claflin & Co. and the bankrupt, with which the defendant had nothing to do, should bar rights arising out of a payment which he was compelled to make. But we do not feel at liberty to give the language of section 57*i* other than its most natural meaning, or to interpret the subrogation there provided for as a subrogation free from the disabilities attached to the creditor, or as a subrogation to the creditor's rights independent of the effect of the preference upon them. One result of such an interpretation would be to allow the claim without a surrender of the preference, contrary to § 57*g*.

It is suggested that the adjudication against Claflin & Co. is *res inter alios*, and there is no other evidence that they accepted a preference. But the defendant's claim by subrogation is affected by the judgment as it is by the preference, and for the same reason. He stands in the shoes of Claflin & Co., succeeds to their place, in the language of the Roman law, and is the same person with them for this purpose, a notion frequently recurring in the law. Dernusson, Subrogation, 3d ed. chap. 1, No. 7; Sheldon, subrogation, 2; 4 Masse, Droit Commercial, 2d ed. chap. 60, No. 2,125, D. 20, 4, 12, § 9, D 4, 12, 16. See *Day* v. *Worcester, N. & R. R. Co.*, 151 Mass. 302, 307, 308, 23 N. E. 824.

The defendant also claims a set-off by virtue of his covenant. We assume that it has been adjudicated between the parties in the district court that the defendant has not a claim which he could prove in his own name, and that this decision carries with it the corollary that he could not prove his claim on the covenant against the estate. If, therefore, the prohibition of a set-off of a claim "which is not provable against the estate" is to be taken with simple literalness as applying to any claim that could not be proved in the existing bankruptcy proceedings, the defendant's set-off cannot be maintained. But we are of opinion that the seemingly simple words which we have quoted must be read in the light of their history and in connection with the general provision at the beginning of § 68 for a set-off of mutual debts "or mutual credits," and that so read they interpose no obstacle to the defendant's claim.

The provision for the set-off of mutual credits is old. Stat. 4 Anne, chap. 17, § 11; 5 Geo. II., chap. 30, § 28; 46 Geo. III., chap. 135, §3; *Gibson* v. *Bell*, 1 Bing. N. C. 743, 753; *Ex Parte Prescott*, 1 Atk. 230. It was adopted in the United States (Acts 1800, chap. 19, § 42, Acts 1841, chap. 9, § 5, and Acts 1867, chap. 176, § 20). But while the provision as to mutual credits was thought to be more extensive than that as to mutual debts (*Atkinson* v. *Elliott*, 7 T. R. 378, 380), it was held that even the broader phrase did not extend to claims which, when the moment of set-off arrived, still were wholly contingent and uncertain, such, for instance, as the claim upon this covenant would have been if the defendant had not yet been called upon to pay anything upon the original partnership debt. *Abbott* v. *Hicks*, 5 Bing. N. C. 578; Robson, Bankr. 7th ed. 374. But the moment when the set-off was claimed was the material moment. The defendant's claim might have been contingent at the adjudication of bankruptcy, and so not provable in the absence of special provisions such as are to be found in the later bankrupt acts in England and in the United States act of 1867, although not in the present law, and yet if it had been liquidated, as here by payment, before the defendant was sued, he was allowed without question to set it off. *Smith* v. *Hodson,* 4 T. R. 211 *Ex parte Boyle, Re Shepherd,* 1 Cooke, Bankrupt Laws, 8th ed. 561; *Ex parte Wagstaff,* 13 Ves. Jr. 65; *Marks* v. *Barker,* 1 Wash. C. C. 178, 181, Fed. Cas. No. 9,096.

The limitations worked out by these decisions were expressed in the section of the act of 1867 cited above, in the words "but no set-off shall be allowed of a claim in its nature not provable against the estate." These words, as it seems to us, following the cases, refer yet to the nature of the claim at the moment when it was sought to set it off, not to its nature at the beginning of the pending bankruptcy proceedings, and did not prevent a set-off of a claim which was liquidated at the later moment merely because, when the bankruptcy proceedings began, for some reason it did not admit of proof. The present statute leaves out the words "in its nature," but we can have no doubt that it was intended to convey the same idea as the longer phrase in the last preceding act, from which in all probability its words were derived. "Provable" means provable in its nature at the time when the set-off is claimed, not provable in the pending bankruptcy proceedings.

The right to set off the claim when liquidated after the beginning of the bankruptcy proceedings was based upon its being a mutual credit, not upon the claim being provable, which it was not until the later bankruptcy statutes. *Russell* v. *Bell,* 8 Mees. & W. 277, 281. Conversely, of course the exclusion of a set-off, when the claim still was contingent and the defendant had made no payment, did not stand on the ground that the claim was not provable in the existing bankruptcy proceedings, but on the ground that it was not provable in its nature, and that there was no machinery available to liquidate it. If we are right in supposing that the act of 1867 meant merely to codify a principle, or rather a limitation developed by the courts, and that the words of the present act mean no more than those of the act of 1867, it follows that, although the defendant's claim could not have been proved against the estate, still it is a mutual credit and may be set off when he is sued.

Judgment for defendant.

THAYER *vs.* DANIELS (1872).

110 Mass. 345.

CONTRACT. The declaration alleged that the defendant as principal, and the plaintiff as surety, signed a note for $500, dated September 28, 1861, and payable on demand to Nathan George or order, with interest; that the plaintiff signed as surety without consideration, and for the accommodation of the defendant; that the defendant failed to pay the note; and that the plaintiff had to pay to George the principal of the note to take it up. The answer denied the allegations of the declaration, and also set up the statute of limitations, and a discharge of the defendant in insolvency.

At the trial in the superior court, before BACON, J., it appeared that the plaintiff executed the note without any consideration, and for the accommodation of the defendant; that the defendant on February 11, 1862, filed his petition for the benefit of the insolvent law; that a warrant was duly issued; that at the third meeting of the creditors George proved the note against the defendant's estate; that a small dividend was then declared; that afterwards, in August, 1862, the defendant was duly discharged from his debts; and that on May 1, 1865, the plaintiff paid to George on the note $500, which was less than the amount then due upon it, and took it up. The defendant asked the judge to rule that the statute of limitations began to run against the plaintiff's cause of action from the time the note fell due; and that the discharge in bankruptcy was a bar to the action; but the judge refused so to rule, and ruled that on the foregoing facts the plaintiff was entitled to recover. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

P. E. Aldrich, (*S. A. Burgess* with him,) for the defendant.

T. G. Kent, for the plaintiff.

AMES, J. There was an implied promise, on the part of the defendant, as principal, to indemnify the surety, and to repay to him all the money that he might be compelled, in consequence of his liability as surety, to pay to the creditor. Until the surety has been compelled to make such payment, there is no breach of this implied promise. The cause of action accrues then for the first time, and the statute of limitations then begins to run. Of course the exception that the claim of the plaintiff is barred by that statute cannot be maintained *Appleton* v. *Bascom,* 3 Met. 169; *Hall* v. *Thayer,* 12 Met. 130.

At the time when the defendant petitioned for the benefit of the insolvent law, the plaintiff's cause of action against him had not accrued. Nothing was due at that time from the insolvent to the plaintiff, and whether anything would become due depended upon the contingency of his being compelled to pay, and actually paying, the note, in whole or in part. If the plaintiff had taken up the note, or made a payment upon it, at any time before the making of the first dividend, his claim for the money so paid would have been provable against the estate of the insolvent, under the Gen. Sts. c. 118, § 25, and would therefore have been barred by the discharge. But it appears from the report that no money was paid by the plaintiff as surety, and no cause of action accrued to him against the insolvent, until long after the first and only dividend was paid from his estate.

The case of *Mace* v. *Wells,* 7 How. 272, which is relied upon by the defendant, arose under the bankrupt act of 1841, a statute which differed from our insolvent law, in allowing sureties and other parties under a contingent liability to prove such contingent liabilities as claims upon the estate, and "when their debts and claims become absolute," to have them allowed.

The defendants also insist that the debt itself was provable and was therefore discharged; but this is not true as to the contingent claim of the surety. He had no claim that was provable under the statute, at the date of the discharge.

Two other cases relied upon by the defendant, *Wood* v. *Dodgson,* 2 M. & S. 195, and *Vansandau* v. *Corsbie,* 8 Taunt. 550,) were decided under English statutes which in express terms make the contingent liability of a surety a provable claim against the bankrupt's estate. In the first of these cases the court say that the statute was intended to benefit the sureties, by allowing them to share in the dividend before the estate is all gone, and before the actual payment of their liabilities. Neither of these decisions is applicable to a case under our insolvent laws.

Exceptions overruled.

LANSDALE *vs.* COX (1828).

7 B. Mon. (Ky.) 401.

Mayes & Chapeze, for plaintiffs.
Hardin & Darby, for defendants.

Opinion of the court by Chief Justice BIBB.

Richard Lansdale and James Cox were the sureties of Shanks, in an injunction bond to Summers, who sued Cox, the surviving obligor, and had judgment for $730.24, beside costs, which was paid by Cox's surety in a replevin bond, and afterward paid by Cox to his surety. These proceedings were in the Nelson circuit court.

Cox thereafter, upon motion against the heirs of Shanks [402] the principal, (stating that there was no executor or administrator of Shanks,) had judgment, and execution, upon which the sheriff made a small part of the judgment, (about $35.19,) and returned that he could find no estate whereof to satisfy the residue.

Cox then sued his motion against the heirs and administrators, jointly, of his co-security, Lansdale, for contribution, and recovered judgment; to which the defendants prosecute this writ of error.

The whole doctrine of contribution between securities originated with courts of equity. There is no express contract for contribution; the bonds, obligations, bills, or notes, created liabilities from the obligors to the obligees. The contribution between co-sureties results from the maxim, that equality is equity. Proceeding on this, a surety is entitled to every remedy which the creditor has against the principal debtor; to stand in the place of the creditor; to enforce every security, and all means of payment; to have those securities transferred to him, though there was no stipulation for that. This right of a surety stands upon a principle of natural justice. The creditor may resort to principal, to either of the securities, for the whole, or to each for his proportion, and as he has that right, if he, from partiality to one surety, or for other cause, will not enforce it, the court of equity gives the same right to the other surety, and enables him to enforce it. Natural justice says that one surety having become so with other sureties, shall not have the whole debt thrown upon him by the choice of the creditor, in not resorting to remedies in his power, without having contribution from those who entered into the obligation equally with him. The obligation of co-sureties, to contribute to each other, is not founded in contract between them, but stood upon a principle of equity, until that principle of equity had been so universally acknowledged, that courts of law, in modern times, have assumed jurisdiction. This jurisdiction of the courts of common law is based upon the idea, that the equitable principle had been so long and so generally acknowledged, and enforced, that persons, in placing themselves under circumstances to which it applies, may be supposed to act under the dominion of contract, implied from the universality of that principle. For a great length of time, equity exercised its jurisdiction exclusively and undividedly; the jurisdiction assumed by the courts of law is, comparatively of very modern date; and is attended with great difficulty where there are many sureties; though simple and easy enough where there are but two sureties, one of whom brings his action against the other upon the implied assumpsit for a moiety.

The action at law, then, by one surety against his co-security, arises out of an implied undertaking, not by force of express contract, and consequently the heirs can not have been expressly bound by the ancestor. So that the action at law, by one surety against the representatives of a deceased co-surety, must, by the principles of the common law, be against the executor or administrator. To reach the heirs in a suit at law, the remedy given by our statute in such cases, must be jointly against the executors or administrators and heirs, not against the heirs alone. The remedy in equity by substitution of the co-security in place of the creditor, and so allowing the one surety his redress against his co-surety or co-sureties for contribution, still remains; the remedy at law, by a regular action jointly against the heirs and executors or administrators, by force and operation of the statute of 1792, may be pursued.

Reversed, with directions to lower court to dismiss motion.[1]

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[1] That part of the opinion dealing with the statute and practice thereunder is omitted.

EASTERLY *vs.* BARBER (1876).

66 N. Y. 433.

There were two appeals in this case, the one by plaintiff from an order of the general term of the supreme court in the fourth judicial department denying motion for a new trial and directing judgment on a verdict, the other by defendant from the judgment entered upon such order.

The action was brought by plaintiff as third indorser of a promissory note to recover the amount thereof of the second indorser.

The note in question was made by the Stevenson Manufacturing Company, payable to the order of one Knight, who indorsed it. Defendant was second indorser, plaintiff third, and one MacDougall the fourth. Defendant alleged in his answer that the note was given and discounted for the benefit of the maker, in which company all the four indorsers were stockholders; that they indorsed for the accommodation of the company under an agreement that as between themselves they should be co-sureties, and share and contribute equally to the amount all or either should be obliged to pay thereon.

Upon a former trial plaintiff recovered a judgment for one-fourth the amount of the note. It appeared on such trial that the two other indorsers were insolvent. The general term reversed the judgment and ordered a new trial on the ground that plaintiff was entitled to judgment for one-half the amount. 3 N. Y. S. C. (T. & C.) 421.

Upon the second, parol evidence was received to prove the allegations of the answer, which was received under objection and exception. The evidence tended to show that the note in suit was a renewal of a former note; that the agreement was made in reference to the original note, which was renewed from time to time. The testimony was conflicting as to whether any thing was said in reference to the liability as co-sureties at the time of the indorsements of the note in suit.

Plaintiff was allowed to prove, under objection and exception, the insolvency of the other two indorsers, Knight and MacDougall. Evidence was given on the part of defendant tending to show that the bank which discounted the note brought suit thereon against plaintiff alone at defendant's request upon his giving security to indemnify the bank.

As to the agreement, the court charged, in substance, that if the jury found that the agreement was made as claimed by defendant, plaintiff was entitled to judgment for one-half the amount of the note, to which defendant's counsel duly excepted.

The court also charged as follows: "If former notes have been given under this agreement, with the understanding that they were to stand with a joint, instead of a separate liability, and that note was carried along until it came to this one, and they signed this note with the arrangement and understanding resting upon their minds, you will have no doubt in coming to the conclusion that this agreement attaches to this last note;" to which plaintiff's counsel duly excepted. Exceptions were ordered to be heard at first instance at general term.

E. H. Avery, for the plaintiff.

Francis Kernan, for the defendant.

MILLER, J. The first question presented upon these appeals is, whether it is competent in an action by one indorser against a prior indorser for the defendant to prove by parol an agreement between all the indorsers that they were, as between themselves, co-sureties where they are accommodation indorsers. In *Barry* v. *Ransom* (12 N. Y. 462) it was held that an agreement made between parties prior to or contemporaneously with their executing a written obligation as sureties, by which one promises to indemnify the other from loss, does not contradict or vary the terms or legal effect of the written obligation, and it may be proved by parol evidence. It was said by DENIO, J., in the opinion, that an agreement among the sureties, arranging their eventual liabilities among themselves in a manner different from what the law would prescribe, in the absence of an express agreement, would not contradict any of the terms of the bond. It was also held, that the engagement among themselves had no necessary place in the instrument between them and the other contracting parties. The case cited referred to a joint and several bond, where the obligors were equally liable upon its face. No reason exists, however, why the same principle is not applicable to notes and bills of exchange. The terms of the contract contained in instruments of this character, which are within its scope to define and regulate, cannot be changed by parol; but the understanding between the indorsers is a distinct and separate subject, an outside matter, which may be properly proved independent of and without any regard to the instrument itself. This rule is distinctly established in reference to joint makers of promissory notes; and although the previous decisions had been somewhat uncertain it has been recently determined by the decision of this court that where a person signed, as surety, a joint and several promissory note, and it did not appear by the instrument itself that such relation existed, he might prove such fact by parol, and that such proof did not tend to alter the terms of the contract. *Hubbard* v. *Gurney,* 64 N. Y. 457. It is not apparent that any such difference exists between the two classes of cases which prevents the application of the same principle to both of them.

An attempted distinction is sought to be maintained because the relation of indorsers to each other are fixed by law; while the relations and obligations of sureties and obligors are not fixed. As between the principal and the sureties they are fixed quite as much as between indorsers, and can only be settled as between sureties where the contract does not show the fact by parol proof of the same. In support of the same views is the case of *Philips* v. *Preston* (5 How. [U. S.] 278, 292), where the doctrine is laid down that proof of a collateral contract, by parol, may be given to show the liability of indorsers as between themselves. See, also, *McDonald* v. *Magruder*, 3 Peters, 470; *Aiken* v. *Barkly*, 2 Speers, 747; *Edelen* v. *White,* 6 Bush. (Ky.), 408; *Davis* v. *Morgan,* 64 N. C. 570. The indorsements upon bills of exchange or promissory notes rest upon the theory that the liability of indorsers to each other is regulated by the position of their names, and that the paper is transferred from the one to the others by indorsement. But this rule has no practical application to accommodation indorsers, where neither of them has owned the paper and no such transfer has been made. It is easy to see that the application of the rule contended for, in many cases, would work the most serious injustice. Suppose a person sign as accommodation maker of a promissory note, and the payee for whose benefit it is made indorses it and pays the note, and afterwards sues the maker to recover back the money, would it be seriously contended that proof could not be given to show that he was merely an accommodation maker? Clearly not; and yet such evidence would contradict the written instrument quite as much as it would to prove an agreement between indorsers in regard to their liability as between each other. Cases frequently arise where it is competent to prove that the indorsement is made for the accommodation of the maker; and a drawee may show, after acceptance, that he has no funds (3 N. Y. 423) in his hands, and that he was merely an accommodation acceptor. *Griffith* v. *Reed,* 21 Wend. 502. The cases to which we have been referred by the plaintiff's counsel do not, we think, sustain the position contended for; that parol proof cannot be given to show an arrangement between accommodation indorsers different from that which appears by the legal effect of the instrument, and a particular examination of them is not required. The uniform practice in this State has been in conformity to the views expressed in reference to proof of this character, and it would be establishing a new rule at this time to hold that such testimony was incompetent. There was, therefore, no error committed by the judge in the admission of the evidence to which objection was taken.

There is no force in the objection made by the plaintiff's counsel that the evidence failed to establish the agreement alleged in the answer to have been made in reference to the note in suit. It was purely a question of fact what the agreement actually made was. No request was made to take the case from the jury, and sufficient was shown to submit the question raised to their consideration. There is no ground for claiming that the defendant was estopped from setting up the verbal agreement alleged to have been made as a defense. The arrangement of the defendant with the bank for the prosecution of the note and the collection of the same of the plaintiff, and the security given thereupon do not contain the elements of an estoppel. The defendant was not the actual party in the suit, and the most which can be said in regard to it is, that the defendant preferred to have it collected of Easterly instead of himself, and to compel Easterly to sue him for the proportion which he was lawfully liable to pay. There was no assumption in this, we think, that estops the defendant.

We are also of the opinion that there was no error in that portion of the charge wherein the court instructed the jury that if former notes had been given under the agreement with the understanding that they were to stand with a joint instead of a separate liability, and they were carried along until they came to this one, which, if it was signed with the arrangement and understanding resting upon their minds, they would have no doubt in coming to the conclusion that this agreement attaches to the last note. This was a necessary result of the facts proved and clearly right. The requests to charge upon this branch of the case in this connection were properly refused, as the propositions presented were sufficiently covered in the charge which had already been made. The discussion had, leads to the conclusion that sufficient grounds are presented on the plaintiff's appeal for a reversal or modification of the judgment.

Other questions arise upon the defendant's appeal, which should be considered. It is claimed that an action at law by a surety for contribution must be against each of the sureties separately for his proportion, and that no more can be recovered, even where one or more are insolvent. In the latter case, the action must be in equity against all the co-sureties for contributions, and, upon proof of the insolvency of one or more of the sureties, the payment of the amount will be adjudged among the solvent parties in due proportion. The principle stated is fully sustained by the authorities. It is thus stated, in Parsons on Contracts (vol. 1, page 34): "At law, a surety can recover from his co-surety an aliquot part, calculated upon the whole number, without reference to the insolvency of others of the co-sureties; but in equity it is otherwise." See, also, *Browne* v. *Lee,* 6 Barn. & Cress. 689, 13 Eng. C. L. 394; *Cowell* v. *Edwards,* 2 B. & Pull. 268; *Beaman* v. *Blanchard,* 4 Wend. 432, 435; Story's Eq. Juris., § 496; 1 Chitty on Con. (5th Am. ed.), 597, 598; Willard's Eq. Juris., 108. There seems to be a propriety in the rule that where sureties are called upon to contribute, and some of them are insolvent, that all the parties should be brought into court and a decree made upon equitable principles in reference to the alleged insolvency. There should be a remedy decreed against the insolvent parties, which may be enforced if they become afterwards able to pay; and this can only be done in a court of equity and when they are parties to the action. The action here was not of this character; nor were all the proper parties before the court. It was clearly an action at law, and in that point of view, as we have seen, the plaintiff could only recover for one-fourth of the debt for which all the sureties were liable. The distinction between the two classes of actions is recognized by the decisions.

The remedies, the parties and course of procedure are each different. In the one, a jury trial is a matter of right; while in the other the trial is by the court. The costs are also in the discretion of the court. (Code, §§ 253, 306; 13 N. Y. [*supra*], 498.) As the judgment could not require each of the parties to pay his aliquot share and furnish a remedy over against those who were insolvent and the rights of the parties be finally determined and fixed, it was under the facts proven clearly erroneous. Although in many cases under the Code the pleadings, if necessary, may be made to conform to the facts, and the case disposed of upon the merits, the defects here are so radical as to strike at the very foundation of the action, and cannot thus be remedied. Besides, the proper parties are not before us, and cannot be brought in, except on motion in the court below. As the claim was alleged in the complaint, there was no such defect of parties apparent as required the defendant to take the objection by demurrer or answer.

It follows that the judgment must be affirmed upon the plaintiff's appeal, with costs of appeal to be paid by the plaintiff upon the final termination of the action, if the defendant succeeds; and if the plaintiff succeeds, to be set off against the plaintiff's costs. And the judgment must be reversed upon the defendant's appeal, with costs of the appeal in this court, and costs in the supreme court to abide the event.

All concur, except CHURCH, Ch. J., dissenting.

Ordered accordingly.

MOORE *vs.* BRUNER (1889).

31 Ill. App. 400.

Mr. C. L. V. Mulkey, for plaintiff in error.

Messrs. Courtney & Helm, for defendant in error.

GREEN, P. J. It is averred in the declaration in this case that plaintiff, Bruner, and Moore, the defendant, together with McCammon and Gray, became sureties on the bond of the guardian of Barnes; that the guardian died owing his ward, and afterward judgment was rendered in Massac probate court against the estate of the guardian in favor of the ward for $500, but the estate being insolvent no part of this judgment was paid; that afterward suit was brought in the Massac circuit court upon the bond against Bruner and McCammon, and judgment was there recovered against them for $500 and costs; that McCammon is insolvent and Gray died insolvent; that plaintiff Bruner discharged said judgment in full, wherefore defendant became liable to pay him $269.45 by way of contribution. A count for money paid out by plaintiff for defendant is added. The cause was tried by the court. Judgment was rendered in favor of the plaintiff for $260 and costs, to reverse which defendant sued out this writ of error.

The cause of action set out in this declaration, is the payment made by Bruner in satisfaction of the judgment recovered against himself and McCammon as sureties upon said guardian's bond, *one-half* of which amount so paid, instead of one-fourth, Bruner insists is the proportion plaintiff in error as a co-surety is legally liable to contribute, because of the insolvency of the two other co-sureties, McCammon and Gray. This was the view of the trial court and in accordance therewith the judgment against plaintiff in error was rendered. The court erred in so holding. At law the amount of damages which plaintiff was entitled to recover from defendant as a co-surety was one-fourth of the whole debt paid, with interest from the time of payment. There were four sureties, each of whom, as between themselves, became liable at law to contribute an aliquot portion of the sum paid by Bruner, and this aliquot portion is to be ascertained upon the basis of the number of sureties, without regard to their solvency. Such we understand to be the law in this state.

It is said in the opinion in *Sloo* v. *Pool,* 15 Ill. 48, "Sureties are individually liable to the creditor, but one is as much bound to discharge the debt as another. If the creditor endeavors to enforce payment from them, it is, as between themselves, the duty of each to pay an aliquot portion of the debt. If that is not done, and one is compelled to pay the whole, he is entitled to contribution from the others in the same proportion. The law implies an agreement between them when they become responsible to the creditor, that if one shall be compelled to pay the debt the others will contribute so as to make the burden equal. If one pays the whole debt he has a cause of action against the others to recover their just proportion, as so much money paid to their use. His right to contribution is complete as soon as he pays the debt, and he may at once call on his co-sureties to bear the common burden with him. At law he can not sue two or more jointly, but he must sue each separately, and he can only recover from one an aliquot portion of the debt, to be ascertained by the number of sureties, without regard to their solvency. In equity, if one is insolvent the loss is apportioned among the others." In 1 Parsons on Cont., 35, the rule is stated thus: "At law a surety can recover from his co-surety only that co-surety's aliquot part, calculated upon the whole number, without reference to the insolvency of either of the co-sureties, but in equity it is otherwise." We have examined the case of *Golden* v. *Brand*, 75 Ill. 148, cited on behalf of appellee, and do not understand the court either did, or intended to, abrogate or modify the rule announced in *Sloo* v. *Pool, supra.*

For the errors indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

Re WALKER; SHEFFIELD BANKING COMPANY *vs.* CLAYTON (1892.)

66 L. T. R. 315.

The following are the only facts material to the present report:—

The testator in the year 1886 gave to the London and Yorkshire Bank two guarantees for the sum of 1000*l.* each to secure the overdraft of Arthur Spencer and Reuben Spencer trading as Spencer Brothers.

At the same time Agnes Spencer, the wife of Arthur Spencer, gave to the testator as security for anything he might be called upon to pay under the guarantees, two equitable mortgages created by memoranda of deposit of title deeds. The memoranda were dated respectively the 5th July and the 18th Aug., 1886.

Subsequently to these transactions Spencer Brothers transferred their account from the London and Yorkshire Bank to the Sheffield Banking Company.

On the 9th Sept., 1887, the testator gave to the Sheffield Banking Company a guarantee to secure the repayment of all moneys then owing, or which might become owing to them by Spencer Brothers either on their current account or on any other account to the extent of 2000*l.*

In the month of May, 1889, Spencer Brothers went into liquidation.

The testator died on the 4th Nov., 1888, leaving a will by which he appointed the defendants his executors. The will was proved by the defendants on the 24th Jan., 1889.

The plaintiff company then commenced a creditor's action for the administration of the testator's estate. An administration judgment was given in that action on the 25th April, 1890.

The testator's estate was insufficient for payment of debts, including the liability of the testator under the guarantee given to the plaintiff company.

The plaintiff company now claimed to be entitled to the benefit of the equitable mortgages given to the testator by Agnes Spencer.

The defendants, on the other hand, contended that the plaintiffs were not so entitled, but could only rank as creditors *pari passu* with the other creditors of the estate.

Graham Hastings, Q. C., and *Curtis Price* for the plaintiffs.

Buckley, Q. C., and *Ingle Joyce* for the defendants.

STIRLING, J., stated the facts and continued:—The plaintiffs' contention was founded upon two cases. The first is an old case of *Maure* v. *Harrison* (*ubi sup.*)[1] It is reported very shortly as follows: "A bond creditor shall in the Court of Chancery have the benefit of all counter-bonds or collateral security given by the principal to the surety; as if A. owes B. money, and he and C. are bound for it, and A. gives C. a mortgage or bond to indemnify him, B. shall have the benefit of it to recover his debt." That case was decided in Michaelmas, 1692. The plaintiff also relied upon a dictum of Sir William Grant in *Wright* v. *Morley* (*ubi sup.*)[2] which runs thus: "I conceive that, as the creditor is entitled to the benefit of all the securities the principal debtor has given to the surety, the surety has fully as good an equity to the benefit of all the securities the principal gives to the creditor." As to the latter portion of the sentence, there is no question at all. It is well established at this date that the surety, on paying the debt, is entitled to stand in the place of the principal creditor, and to have the benefit of all the securities which the principal creditor had. Now these two cases were very much discussed in the well-known case of *Ex parte Waring* (*ubi sup.*)[3], before Lord Eldon. That case is most fully reported perhaps in Glyn & Jameson's Reports. It appears from that report that, in the course of the argument, Lord Eldon spoke somewhat disparagingly of the case of *Maure* v. *Harrison.* He said this: "I have never heard this case relied upon as a governing case at this day." In the judgment as reported in 19 Vesey, p. 348, he puts it thus: "The prayer of the first of these petitions has been supported upon this ground, that the short bills and the mortgage * * * having been placed with Brickwood and Co. as a security against their acceptances, the holders of those bills have an equity to have that security applied specifically to the discharge of those acceptances upon the general ground that, upon a transaction of this kind, a person holding the bills which are the subject of indemnity has a right to the benefit of the contract between the principal debtor and the party indemnified, and, though not himself a party to that contract, to say that he, who has contracted for the payment of certain debts out of those pledges, is liable in equity to the demand upon the part of those whose demands are to be so paid for that application, and a case was cited (*Maure v. Harrison*) which goes that length. With regard to that case, or cases in general, I desire it to be understood that I forbear to give my opinion upon that point." Then he goes on to say that he decides not on *Ex parte Waring* but on another ground. The result of these two cases, namely the dictum of Sir W. Grant in *Wright* v. *Morley* and the judgment and observations of Lord Eldon in *Ex parte Waring,* seems to me to be that Sir W. Grant and Lord Eldon were not of the same mind on the point. Under these circumstances I was very anxious to discover what was really done in the case of *Maure* v. *Harrison,* which it so shortly reported in Eq. Cas. Abr. The registrar has been kind enough to make search for that case. No decree was drawn up, but the entry of the case has been found in the registrar's book, and the pleadings have been discovered, and I am indebted to the learned reporter of this court, Mr. Knox, for having made a summary of them for my use, the pleadings themselves being somewhat lengthy. From them and the notes in the registrar's book it is tolerably easy to discover what the case was. The plaintiff was Thomas Maure, the defendants were William Harrison and William Morley and Mary his wife. Thomas Maure was the father of the first wife of William Harrison, the father of William Harrison the defendant. By that first marriage William Harrison the father had three children, viz., William, the defendant, Thomas, and Margaret. The first wife having died, William Harrison, the father, married his second wife Mary, the defendant, then the wife of William Maure, and afterwards he died intestate leaving this widow and three children by the first wife the persons entitled to his personal estate under the statute of distribution. Administration was taken out by his widow, and the shares of the three children in the intestate's property amounted to 120*l.* It appears that the plaintiff, Thomas Maure, the grandfather of William Harrison the defendant, was very anxious that William Harrison, his grandson, should continue the business of a farmer which had been carried on by William Harrison the father, but for that purpose it was necessary that the sum of 120*l.* which formed the portion of the intestate's estate belonging to the three children should be paid over to William Harrison the son, and that was accordingly done. The two other children being infants, Thomas Maure the father and the plaintiff in the action gave a bond to the defendant Mary Morley, the legal personal representative of the intestate, to indemnify her against all claims by those children. It appears that at this time William Harrison, the defendant, was an infant, but the money was paid to him. He attained twenty-one, and carried on the farm for some time. After attaining twenty-one he repudiated the transaction and began to press William Morley and Mary his wife for payment of his share of his father's estate, which he had already received in point of fact, though apparently an infant. Thereupon William Morley gave him a bond for payment of his share, and William Morley and Mary his wife began to sue the plaintiff Thomas Maure in the Court of Exchequer for payment under the bond which had been given by him. Thereupon the plaintiff instituted this suit in equity to restrain the action, and to obtain delivery up of the bond which had been given by him. Now, of the other children who were interested in the intestate's estate, Thomas had died an infant and intestate, and Margaret was still an infant, and was not a party to the suit. The argument is stated in the registrar's book. It is to be observed that the bill is by the person who gave the bond to be relieved of it, and the result is thus stated in the registrar's book: "By the Court; Do declare that the defendant William is well paid, and he must deliver up the bond to the other defendant." That is the bond (as I read it) which had been given by William Morley to the defendant William Harrison for payment of his share. Whether that relief ought to have been inserted in the decree may be a question, because that would be relief between co-defendants. Then it goes on, "stay all proceedings at law on the plaintiffs' 100*l.* bond"—that is a mistake, for 120*l.* as clearly appears from the previous passage in the registrar's note, where it is corrected in the margin, but the correction is omitted here—"till Margaret doth release, and when the plaintiff hath procured Margaret. who is not a party to the action, to release that bond, then that bond to be delivered up" and so forth "but then the plaintiff's bond to be at suit for the recovery of Margaret's moiety of 120*l.*" So that all that was decided in that action was that the plaintiff, who had given his bond of indemnity, was not entitled to have it delivered up to be cancelled till all claims had been settled. Under these circumstances it appears that the point for which it was cited in Eq. Cas. Abr. could not have been decided in that case, and that at most the reported statement amounts to a dictum in the course of the argument. It is now nearly two hundred years since this case was decided, and the sole authorities on a point which must have been of frequent occurrence are a dictum in 1692, a dictum early in this century by Sir William Grant in the year 1805, and what appears to me to be the contrary opinion of Lord Eldon a little later. Under those circumstances it seems to me that there is no authority for the proposition in question. Upon principle I cannot see why a surety who takes from the principal debtor a bond or indemnity at once becomes a trustee of that for the principal creditor. That is really the contention of the plaintiffs. Of course the other doctrine is well established, viz., that the surety who pays the debt is entitled to stand in the place of the principal creditor; but this doctrine rests entirely on those dicta which I have mentioned. It seems to me that under these circumstances I cannot give effect to the contention of the plaintiffs, and that they must simply be left to prove against the estate of the testator for what is due, without having the exclusive benefit of these securities in respect of which payments have been made to the estate.

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[1] 1 Eq. Cas. Abr. 93; 20 Vin. Abr. p. 102.

[2] 11 Ves. 22.

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[3] 2 G. & J., 404; 19 Ves. 345.

Solicitors for the plaintiff company, *Pilgrim* and *Phillips*.

Solicitors for the defendants, *Few* and *Co.*, agents for *John James,* Wirksworth.

TRIMBLE *vs.* RUDY (1901).

.. Ky. ...., 53 L. R. A. 353; 60 S. W. 650.

APPEAL by plaintiff from a judgment of the Circuit Court for Henderson county in favor of defendant in an action to enforce a promise by defendant to reimburse plaintiff's assignee for the amount which he had paid as surety for defendant's husband. Affirmed.

The facts are stated in the opinion.

Mr. R. H. Cunningham, for appellant.

Mr. Montgomery Merritt, for appellee.

O'REAR, J. While appellee was a married woman, and before the enactment of our present married women's act, appellant H. S. Holloway, who was her kinsman, executed to the Planters' Bank a note for $2,500, and one to the Farmers' Bank for $900, as surety of appellee's husband. Appellant claims that he was induced to incur these liabilities by appellee's personal assurances or promises of indemnity against loss, and that he would not have done so but for his reliance upon her agreement to keep him from loss on that account. The husband died in 1893, after appellant's liability had been assumed, and left an estate totally insolvent. After the husband's death appellee wrote appellant asking him to pay off the notes in question, and again promising to indemnify him against loss. Appellant did pay off these notes, because, he says, of this solicitation and promise. Appellee declining to comply with her agreement to repay the surety these sums paid by him, he sued her on the last-named or written promise to pay. Other allegations were contained in the petition, but were denied, and, there being a total failure of proof as to those that were denied, we are to determine whether the trial court's peremptory instruction to the jury to find for the defendant was proper. The determination of that question involves the one whether the promise of a married woman, made while under the disability of coverture, inducing another to become bound as the surety of her husband, is a sufficient consideration to support a promise of indemnity made to the surety after the removal of such disability.

It is argued for appellant that her original promise was based upon facts imposing upon her a moral obligation, and that although not legally binding because the law prohibited her from legally binding herself, upon the law's restrictions being removed the original moral obligation was enough to support a new promise to pay. While formerly extensively held that a moral obligation was a sufficient consideration to uphold a contract between competent parties, it has lately come to be denied, until it may now be seriously doubted whether the ancient rule longer obtains. Bishop, Contr. 44, and cases cited; Parsons, Contr. 432, 435, and notes. It has been held in this state that a moral obligation, where it has also been a legal one, might be the consideration of a new contract (*Montgomery* v. *Lampton,* 3 Met. 520; *Muir* v. *Gross,* 10 B. Mon. 282); but we are not aware that the rule has been extended further, and, in the light of the trend of the later cases, we are disinclined to so extend it.

We have repeatedly held that the contract of a married woman, not with reference to her separate estate, and where not especially allowed by statute, was void, and that her subsequent promise to pay such an obligation, made after discoverture, was likewise void,—the first, because she was not competent to make the contract; the second, because there was no consideration to support it. *Robinson* v. *Robinson,* 11 Bush, 179; *Jennings* v. *Crider,* 2 Bush, 322, 92 Am. Dec. 487; *Russell* v. *Rice,* 19 Ky. L. Rep. 1613, 44 S. W. 110; *Chaney* v. *Flynn,* 2 Ky. L. Rep. 417; and others.

We think the fair deduction from the foregoing line of decisions is that, without reference to what may have been the merit of the consideration of the original promise, the new contract, to be binding, must be based upon a new consideration, legal and sufficient of itself, and independent of the original one. That the surety paid off these notes upon the faith of the appellee's letter was not such new consideration; for he assumed no new condition, and did nothing he was not already legally bound to do.

It follows that the giving of the peremptory instruction was proper, and the judgment is therefore affirmed.

VAIL *vs.* FOSTER *et al.* (1850).

4 N. Y. 312.

Varick & Eldridge, for appellants.

W. J. Street, for respondents.

BRONSON, Ch. J. The case is shortly this. The plaintiffs sold land to Morgan, who, instead of giving his bond and mortgage to the plaintiffs to secure the purchase money, got Flagler to give his note to the plaintiffs for the amount, payable in one year; and Morgan gave a bond and mortgage to Flagler for his indemnity, for the same amount, and payable at the same time with the note. Before the credit expired Flagler became insolvent and the plaintiffs seek relief, either on the ground of an equitable lien on the land for the purchase money, or by reaching the mortgage to Flagler, and having it foreclosed for the payment of the debt.

By taking the security of a third person for the purchase money the plaintiffs have lost their equitable lien on the land, and can not have relief in that form, as has been very clearly shown by the vice-chancellor in his opinion. And I agree in most that he has said upon the whole case. But there is one point on which I think the supreme court was right in reversing the vice-chancellor's decree, and directing a foreclosure of the mortgage for the benefit of the plaintiffs.

It is a settled rule in equity, that the creditor shall have the benefit of any counter bonds or collateral securities which the principal debtor has given to the surety, or person standing in the situation of a surety, for his indemnity. Such securities are regarded as trusts for the better security of the debt, and chancery will compel the execution of the trusts for the benefit of the creditor. *Maure* v. *Harrison,* 1 Eq. Cas. Ab. 93, K. 5; *Curtis* v. *Tyler,* 9 Paige, 432; *Wright* v. *Morley,* 11 Ves. 22; *Bank of Auburn,* v. *Throop,* 18 John, 505; 4 Kent, 307, 6th ed.; 1 Story's Eq. §§ 502, 638. This principle covers the case; and the plaintiffs are entitled to the mortgage which Morgan, the principal debtor, gave to Flagler, the surety, for his indemnity.

But it is said that Morgan is not a debtor to the plaintiffs, and consequently that the relation of principal and surety does not exist between him and Flagler. It is true that Morgan did not unite with Flagler in making the note, nor did he come under any other express obligation to the plaintiffs. But he was originally a debtor to the plaintiffs for the price of the land; and although the plaintiffs afterwards took the note of Flagelr in lieu of the bond and mortgage of Morgan, they took it as a security only for the purchase money, without agreeing to receive it in satisfaction of the debt. Taking the note of a third person for an existing debt is not payment, unless the creditor agrees to receive it in payment; and I find no such agreement in this case. Morgan is still liable to the plaintiffs for the purchase money, and must of course be regarded, as the principal debtor; for it is entirely clear, upon the pleadings and proofs, that Flagler gave the *note* at the request, and as the surety of Morgan, without having any personal interest in the matter. We have then the ordinary case of creditor, principal and surety, to which the rule in question has been applied; and the mortgage which the principal debtor has given to the surety must be considered as a trust for the better security of the debt, which a court of equity will enforce for the benefit of the creditor.

Foster & Co. under their creditor's bill, took the effects of Flagler subject to this equity; and there is no bona fide purchaser in the case.

I am of opinion that the decree of the supreme court is right, and should be affirmed.

Decree affirmed.

DOBIE *vs.* FIDELITY & CASUALTY CO. OF NEW YORK (1897).

95 Wis. 540: 70 N. W. 482.

Suit by David Dobie against the Fidelity & Casualty Company of New York to compel defendant to exonerate plaintiff from liability on an appeal bond. From a judgment for plaintiff on the pleadings, defendant appeals. Affirmed.

One Knute Anderson obtained a judgment against M. C. Burke and John Burke. The action was for personal injuries. The Fidelity & Casualty Company was an insurer of the Burkes against such claims, and was defending the action. It procured Dobie and Tennis to become sureties on the appeal, and gave them its own bond in the sum of $7,000 to indemnify them, conditioned to "answer for all damages, interest and costs, if any, that shall be adjudged" against the appellant, and "to save Tennis and Dobie harmless from all costs and damages on account of their obligation as sureties." Judgment was against the appellant on the appeal, and Tennis and Dobie became liable on their undertaking. No part of the judgment has been paid. The plaintiff brings this action to compel the defendant, the Fidelity & Casualty Company, to pay the judgment, and so exonerate the plaintiff from liability. The plaintiff had judgment upon the pleadings, according to the demand of his complaint, and the defendant appeals.

Ross, Dwyer & Hanitch, for appellant.

Thorson & Crawford, for respondent.

Newman, *J.* (after stating the facts). The question presented is whether the complaint states a cause of action| The action is by a surety to compel his principal to pay the debt for which both are liable, for the exoneration of the surety. It is ultimately the defendant's liability. That party is the principal debtor, who is ultimately liable for the debt. The question is whether a surety can, in equity, compel his principal to exonerate him from liability , by extinguishing the obligation, without having first paid it himself. It seems to be well settled that a surety against whom a judgment has been rendered may, without making payment himself, proceed in equity against his principal to subject the estate of the latter to the payment of the debt, in exoneration of the surety. 2 Beach, Eq. Jur. § 903; 3 Pom. Eq. Jur.§ 1417; Will. Eq. Jur. 110; *United New Jersey Railroad & Canal Co.* v. *Long Dock Co.*, 38 N. J. Eq. 142; *Beaver* v. *Beaver*, 23 Pa. St. 167; *Gibbs* v. *Mennard*, 6 Paige, 258; *Warner* v. *Beardsley*, 8 Wend. 194; 7 Am. & Eng. Enc. Law, 486, cases in note. The judgment of the superior court of Douglas county is affirmed.

Henry E. Carter

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